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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 223.

THE UNITED STATES, APPELLANT,

vs.

BITTER ROOT DEVELOPMENT COMPANY, ANACONDA MINING COMPANY, ANACONDA COPPER COMPANY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 8TH, 1905.

(19703.)

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a No. 1047.

United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Company (a corporation), Margaret P. Daly, Margaret P. Daly as Executrix of the Last Will and Testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, appellees.

Transcript of record upon appeal from the United States Circuit Court for the District of Montana.

1 The Circuit Court of the United States, Ninth Circuit, District of Montana.

THE UNITED STATES OF AMERICA, COMPLAINANT AND Appellant,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Company (a corporation), Margaret P. Daly, Margaret P. Daly as Executrix of the Last Will and Testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, defendants and appellees. } In equity.

Caption.

Be it remembered that on the 26th day of February, 1903, the complainant filed its bill of complaint herein, which is entered of final record, as follows, to wit:

2 THE UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Ninth Circuit and District of Montana.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Company (a corporation), Margaret P. Daly, Margaret P. Daly as Executrix of the Last Will and Testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, defendants. } In equity.

Bill of complaint.

To the judges of the Circuit Court of the United States for the District of Montana:

Your orator, the United States of America, by Philander C. Knox, Attorney-General of the United States, brings this, its bill of com-

3 plaint against the Bitter Root Development Company, a corporation; the Anaconda Mining Company, a corporation; the Anaconda Copper Company, a corporation; the Anaconda Copper Mining Company, a corporation, all organized under and by virtue of the laws of the State of Montana; Margaret P. Daly; Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, citizens of the United States and of the State of Montana, and residents in the State of Montana, and thereupon your orator complains and says:

1. That on the 1st day of April, 1888, said complainant was and is now the owner in fee and in the possession of certain lands in the State of Montana, described as follows, to wit:

Sections twenty-eight (28), twenty-nine (29), thirty-two (32), and thirty-three (33) of township numbered five (5) north, of range numbered eighteen (18) west, of the Montana meridian, in the Missoula land district, State and district of Montana.

The southeast one-fourth (¼) of the southeast one-fourth (¼), and the northwest one-fourth (¼) of section twenty (20), and section eighteen (18) of township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and district of Montana.

The southeast one-fourth (¼) of the southwest one-fourth (¼), and the southwest one-fourth (¼) of the southeast one-fourth (¼), and lot

4 seven (7) in section fourteen (14), and the northwest one-fourth (¼) of the northeast one-fourth (¼), and lot two (2) in section twenty-three (23), township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and district of Montana.

The southwest one-fourth (¼) of the northwest one-fourth (¼), and the northeast one-fourth (¼) of the southwest one-fourth (¼), and the northwest one-fourth (¼) of the southeast one-fourth (¼), and lot three (3) of section fourteen (14) of township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and district of Montana.

The northwest one-fourth (¼) of the southwest one-fourth (¼), and lots three (3), seven (7), and eight (8), in section twenty-five (25), and the southeast one-fourth (¼) of the northeast one-fourth (¼) in section twenty-six (26), township three (3) north, of range twenty-one (21) west, of the Montana meridian, in the Missoula land district, State and district of Montana.

The northeast one-fourth (¼) of the southeast one-fourth (¼) of section twenty-seven (27), township three (3) north, of range twenty-one (21) west, of the Montana meridian.

The northeast one-fourth (¼) of the northeast one-fourth (¼) of section nineteen (19), township two (2) north, of range twenty (20) west, of the Montana meridian.

The south one-half (½) of the southeast one-fourth (¼) and the

5 south one-half (½) of the southwest one-fourth (¼) of section twenty-one (21), township three (3) north, of range twenty-one (21) west, of the Montana meridian.

The west one-half (½) of the northeast one-fourth (¼) of section eighteen (18), township two (2) north, of range twenty (20) west, of the Montana meridian.

Lots one (1), four (4), and eight (8) in section twenty-three (23), and lot one (1) in section twenty-six (26), township three (3) north, of range twenty-one (21) west of the Montana meridian.

The north one-half (½) of the southeast one-fourth (¼) and the northeast one-fourth (¼) of the southwest one-fourth (¼) and the southeast one-fourth (¼) of the northwest one-fourth (¼) of section twenty-one (21), township three (3) north, of range twenty-one (21) west of the Montana meridian.

The south one-half (½) of the southeast one-fourth (¼) of section thirty-three (33) and the south one-half (½) of the southwest one-fourth (¼) of section thirty-four (34), in township two (2) north, of range twenty-one (21) west of the Montana meridian.

Section four (4), in township one (1) north, of range twenty-one (21) west of the Montana meridian.

The northeast one-fourth (¼) of section twenty-eight (28), in township two (2) north, of range twenty-one (21) west of the Montana meridian.

Township one (1) north, of range twenty-one (21) west of the Montana meridian.

6 The northeast one-fourth (¼) of the southeast one-fourth (¼) and the west one-half (½) of the southeast one-fourth (¼) and the southeast one-fourth (¼) of the southwest one-fourth (¼) of section twenty-seven (27), in township two (2) north, of range twenty-one (21) west of the Montana meridian.

The northwest one-fourth (¼) of section twenty-seven (27) and the west one-half (½) of the southeast one-fourth (¼) and the southeast one-fourth (¼) of the southwest one-fourth (¼) of section twenty-seven (27), in township two (2) north, of range twenty-one (21) west of the Montana meridian.

The northeast one-fourth (¼) of the southeast one-fourth (¼) of section eight (8), in township four (4) north, of range twenty-one (21) west of the Montana meridian.

Section eighteen (18) and the southeast one-fourth (¼) of the southeast one-fourth (¼) and the northwest one-fourth (¼) of section twenty (20), in township three (3) north, of range twenty-one (21) west of the Montana meridian.

Sections seven (7) and eighteen (18) and the west one-half (½) of the northwest one-fourth (¼) and the north one-half (½) of the southwest one-fourth (¼) and the north one-half (½) of the southeast one-fourth (¼) of section seventeen (17), in township four (4) north, of range twenty-one (21) west of the Montana meridian, and section thirteen (13), in township four (4) north, of range twenty-two (22) west of the Montana meridian.

Township one (1) north, of range twenty-one (21) west of the Montana meridian.

7 The southwest one-fourth (¼) and the west half (½) of the southeast one-fourth (¼) of section thirty-three (33), in township two (2) north, of range twenty-one (21) west of the Montana meridian.

The south half (½) of the northeast one-fourth (¼) and the northeast one-fourth (¼) of the southeast one-fourth (¼) of section twenty-eight (28), township four (4) north, of range twenty-one (21) west of the Montana meridian.

Section twenty-three (23), in township two (2) north, of range twenty-one (21) west of the Montana meridian.

The northeast one-fourth (¼) of the southeast one-fourth (¼) of section twenty-three (23), township three (3) north, of range twenty-one (21) west of the Montana meridian.

The southeast one-fourth (¼) of the northwest one-fourth (¼) of section twenty-seven (27), township three (3) north, of range twenty-one (21) west of the Montana meridian.

The northwest one-fourth of section twenty-eight (28) and the southeast one-fourth (¼) and the west one-half (½) of the southeast one-fourth (¼) and the southwest one-fourth (¼) of the northeast one-fourth (¼) and the northeast one-fourth (¼) of the northeast one-fourth (¼) of section twenty-one (21), of the northwest one-fourth (¼) of section twenty-two (22), of township two (2) north, of range twenty (20) west of the Montana meridian.

The north one-half (½) of the northwest one-fourth (¼) and the southwest one-fourth (¼) of the northwest one-fourth (¼) of section twenty (20) and the southeast one-fourth (¼) of the northeast one-fourth (¼) of
8 section nineteen (19), of township two (2) north, of range twenty (20) west of the Montana meridian.

The southwest one-fourth (¼) of the northwest one-fourth (¼) of section twenty-seven (27), township four (4) north, of range twenty-one (21) west of the Montana meridian.

The southwest one-fourth (¼) of section thirty-three (33), township three (3) north, of range twenty-one (21) west of the Montana meridian.

The southwest one-fourth (¼) of section twenty-two (22), township four (4) north, of range twenty-one (21) west of the Montana meridian.

The southeast one-fourth (¼) of the northwest one-fourth (¼) and the north one-half (½) of southwest one-fourth (¼) and the southwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty (20), township two (2) north, of range twenty (20) west of the Montana meridian.

Sections twenty-three (23) and twenty-four (24), township two (2) north, of range twenty-one (21) west of the Montana meridian.

Section twenty-five (25), township two (2) north, of range twenty-one (21) west of the Montana meridian.

The west one-half (½) of the northwest one-fourth (¼) of section twenty-one (21), township two (2) north, of range twenty (20) west of the Montana meridian.

The south one-half (½) of the northeast one-fourth (¼) and the north one-half (½) of the southeast one-fourth (¼) of section twenty (20), township two (2) north, of range twenty (20) west of the Montana meridian.

9 The southwest one-fourth (¼) of the southeast one-fourth (¼), and the southeast one-fourth (¼) of the southeast (¼) of section twenty-two (22), and the northeast one-fourth (¼) of the northwest one-fourth (¼), and the northwest one-fourth (¼) of the northeast one-fourth (¼) of section twenty-seven (27), township two (2) north, of range twenty (20) west of the Montana meridian.

The east one-half (½) of the northeast one-fourth (¼) and the southeast one-fourth (¼) of section twenty-four (24), township two (2) north, of range twenty-one (21) west of the Montana meridian, and the west one-half (½) of the northeast one-fourth (¼), and lots one (1), two (2), and three (3) of section nineteen (19), and the west one-half (½) of the south-

east one-fourth (¼) of section eighteen (18), township two (2) north, of range twenty (20) west of the Montana meridian.

The north one-half (½) of the northeast one-fourth (¼) and the east one-half (½) of the northwest one-fourth (¼) of section twenty-seven (27), township four (4) north, of range twenty-one (21) west of the Montana meridian.

The northwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-seven (27), township four (4) north, of range twenty-one (21) west of the Montana meridian. All in the Missoula land district, State and district of Montana.

The southeast one-fourth (¼) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the southeast one-fourth (¼) and lot seven (7) of section fourteen (14), and the northwest one-fourth (¼) of the northeast one-fourth (¼) and lot two (2), township three (3) range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The north one-half (½) of the northwest one-fourth (¼) of section twenty-six (26) and the southeast one-fourth (¼) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the southeast one-fourth (¼) of section twenty-three (23), township two (2), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The south one-half (½) of the southwest one-fourth (¼) and the northeast one-fourth (¼) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the southeast (¼) of section eleven (11), township four (4), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The north one-half (½) of the southeast one-fourth (¼) and the north one-half (½) of the southwest one-fourth (¼) of section ten (10), range twenty-one (21), township four (4) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The northwest one-fourth (¼) of the southeast one-fourth (¼) and the southeast one-fourth (¼) of the northwest one-fourth (¼) of section eleven (11), township four (4), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The northeast one-fourth (¼) of the northeast one-fourth (¼) of section fifteen (15), township four (4), range twenty-one (21) west of the
11 Montana meridian, in the county of Ravalli, State and district of Montana.

The east one-half (½) of the northwest one-fourth (¼) and the east one-half (½) of the southwest one-fourth (¼) of section twenty-eight (28), township six (6), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southeast one-fourth (¼) and the west one-half (½) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the northwest one-fourth (¼) of section three (3), township five (5), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southwest one-fourth (¼) of the northeast one-fourth (¼) and the southeast one-fourth (¼) of the northeast one-fourth (¼) of section fifteen

(15), township four (4), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The west one-half (½) of the northeast one-fourth (¼), and the southeast one-fourth (¼) of the northeast one-fourth (¼), and the northeast one-fourth (¼) of the southeast one-fourth (¼) of section thirty-three (33), township six (6), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The northeast one-fourth (¼) and the southeast one-fourth (¼) of section thirty-three (33) and the southwest one-fourth (¼) of section thirty-four (34), township six (6) north, of range twenty-one (21) west
12 of the Montana meridian, in the county of Missoula and State and district of Montana.

The southwest one-fourth (¼) of section fifteen (15), township five (5), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

Lands in section two (2), township four (4) north, of range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southwest one-fourth (¼) of the northwest one-fourth (¼) of section twenty-six (26) and the northwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-six (26), township two (2), range twenty-one (21) west of the Montana meridian, in the Missoula land district, State and district of Montana.

The southeast one-fourth (¼) of the southeast one-fourth (¼) of section thirty-four (34) and the west one-half (½) of the southwest one-fourth (¼) and the southwest one-fourth (¼) of the northwest one-fourth (¼) of section thirty-five (35), township two (2), range twenty (20) west of the Montana meridian, in the Missoula land district, State and district of Montana.

Land on the east fork of the Bitter Root River, and near what will be when the survey is accepted section twenty-seven (27), township two (2), range twenty (20) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

Lands being on the west fork of the Bitter Root River and which when surveyed will be in township one (1), range twenty-one (21)
13 west of the Montana meridian, in the Missoula land district, State and district of Montana.

The southwest one-fourth (¼) of the southeast one-fourth (¼), and the east one-half (½) of the southeast one-fourth of section twenty-seven (27), and the northwest one-fourth (¼) of section thirty-four (34), township three (3) north of range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southeast one-fourth (¼) of the southwest one-fourth (¼), and the southwest one-fourth (¼) of the southeast one-fourth (¼), and lot seven (7), of section fourteen (14), and the northwest one-fourth (¼) of the northeast one-fourth (¼), and lot two (2) of section twenty-three (23), township three (3), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-eight (28), township six (6), range twenty-one (21) west, and

the balance of land now claimed in said section twenty-eight (28), by Lee Hyatt, in the Missoula land district, State and district of Montana.

The west half (½) of the northwest one-fourth (¼) and the west half (½) of the southwest one-fourth (¼) of section twenty-eight (28), township six (6), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The northwest one-fourth (¼) of section thirty-three (33), range
14 twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southwest one-fourth (¼) of section fifteen (15), township five (5) north of range twenty-one (21) west of the Montana meridian, in the county of Missoula, State and district of Montana.

The southeast one-fourth of the southwest one-fourth (¼), and the south half (½) of the southeast one-fourth (¼) of section twenty-one (21), and the southwest one-fourth (¼) of the southwest one-fourth (¼) of section twenty-two (22), township two (2), range twenty (20) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The east side and adjoining the Bitter Root River in section two (2), township four (4) north of range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

Lands on the east side of the Bitter Root River, adjoining said river in section two (2), township four (4) north of range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

Lands situated in township two (2), range twenty (20) west of the Montana meridian, in the Missoula land district, State of Montana.

Forty acres in township two (2) north of range twenty-one (21) west, in section thirty-four (34); also one hundred and twenty (120) acres in section three (3), township one (1) north of range twenty-one (21) west, adjoining the west fork of the river, in the county of Ravalli, State and district of Montana.

15 The north one-half (½) of section seventeen (17), township one (1) north of range twenty-one (21) west; the southwest one-fourth (¼) of section twenty (20), township one (1) north of range twenty-one (21) west; the northwest one-fourth (¼) of section twenty (20), township one (1) north of range twenty-one (21) west; and the north one-half (½) of the northeast one-fourth (¼) of section thirty (30), township one (1) north of range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The southwest one-fourth of the southwest one-fourth (¼) of section thirty-four (34), and the south one-half (½) of the southeast one-fourth (¼) of section thirty-three (33), township two (2) north of range twenty-one (21) west, and the northeast one-fourth (¼) of the northeast one-fourth (¼) of section four (4), township one (1) north of range twenty-one (21) west of the Montana meridian, in the Missoula land district, State and district of Montana.

Lands situate, lying, and being in township one (1), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

The north one-half (½) of the northwest one-fourth (¼) of section

twenty-six (26), and the southeast one-fourth (¼) of the southwest one-fourth (¼), and the southwest one-fourth (¼) of the southeast one-fourth (¼) of section twenty-three (23), township two (2), range twenty-one (21) west of the Montana meridian, in the county of Ravalli, State and district of Montana.

16 Lands situate, lying and being in sections twenty-five (25) and thirty (30), township one (1) north of range twenty-one (21) west, and township one (1) north of range twenty-two (22) west of the Montana meridian, in the Missoula land district, State and district of Montana.

Lands lying in the east side of the south fork of the Bitter Root River, in the Missoula land district, State and district of Montana, a more particular description of which said land is to your orator unknown.

The north one-half (½) of section four (4), township one (1) north of range twenty-one (21) west; the southeast one-fourth (¼) of the southeast one-fourth (¼) of section five (5), township one (1) north of range twenty-one (21) west; the northeast one-fourth (¼) of section eight (8), township one (1) north of range twenty-one (21) west; and the northwest one-fourth (¼) of section nine (9), township one (1) north of range twenty-one (21) west of the Montana meridian, in the Missoula land district, State and district of Montana.

Lands within the boundaries of the Bitter Root Forest Reserves and will be, when surveyed, in townships one (1) north and one (1) south, range twenty-two (22) west of the Montana meridian, in the Missoula land district, State and district of Montana.

Lands within the boundaries of the Bitter Root Forest Reserves and will be, when surveyed, in townships No. one (1) north, and No. one (1) south, range No. twenty-two (22) west of the Montana meridian, in the Missoula land district, State and district of Montana.

Unsurveyed lands as follows:

17 Lands lying on the East Fork of the Bitter Root River in township one (1) north, of range twenty (20) west, of the Montana meridian, and adjoining the claim of Herbert Lord on the East Fork of the Bitter Root River, in the Missoula land district, a more particular description of which said lands is to your orator unknown.

One hundred and sixty acres of unsurveyed land on the East Fork of the Bitter Root River, in the Missoula land district, State and district of Montana, a more particular description of which said land is to your orator unknown.

Lands situated about one mile east of White's Hot Springs, in a canyon about one-fifth of a mile wide and extending one-half of a mile along the East Fork of the Bitter Root River, in the Missoula land district, State and district of Montana.

One hundred and sixty acres of unsurveyed land on the main road from Darby to Sula, Montana, adjoining the East Fork of Bitter Root River and one and a half miles southeast of section thirty-four, township two (2) north of range twenty west of Montana meridian.

Lands situated about one mile east of Wile's Hot Springs, and extends one mile along both banks of the East Fork of Bitter Root River, in the Missoula land district, State and district of Montana, a more particular description of which said land is to your orator unknown.

One hundred and sixty acres on the main road from Darby to
18 Sula, Montana, and adjoining the East Fork of the Bitter Root River, and two miles southeast of section thirty-four (34), township two (2) north of range twenty (20) west of the Montana meridian, State and district of Montana, a more definite description of which said land is to your orator unknown.

One hundred and sixty acres on the main road from Darby to Sula, Montana, and adjoining the East Fork of the Bitter Root River, and two and one-half miles southeast of section thirty-four (34), township two (2) north of range twenty (20) west of the Montana meridian, in the Missoula land district, State and district of Montana, a more particular description of which said land is unknown to your orator.

A strip of unsurveyed land beginning one-fourth of a mile from squatter claim of T. W. Laird—that is, one-half mile south of W. P. Bean land in section thirty-four (34), township two (2) north of range twenty (20) west of the Montana meridian, and extending up Laird Creek that empties into the East Fork of Bitter Root River, and also on the mountain on the north side of said creek in the Missoula land district, State and district of Montana, a more definite description of which said land is to your orator unknown.

2. Your orator further shows that on the day and year last aforesaid, on these vast tracts of land there were then growing and standing great forests of pine, fir, and other kinds of trees of various dimensions, fit to manufacture into lumber for mining, commercial, and all other purposes for which lumber is used; that said forests were of great value, to wit,
of the value of two million dollars ($2,000,000) and upwards, the
19 exact value thereof being to your orator unknown; that these forests and the land upon which they were growing and standing were the absolute property of the complainant, the United States of America, and was a portion of its public domain.

3. Your orator further shows that on this the day of filing its bill of complaint in this court the lands above described have for the most part been stripped of the pine and other trees and timber that were standing and growing up them as aforesaid, and, except very small portions thereof, were so denuded without license, authority, or permission of the United States or anyone authorized to represent the complainant; and this was done in violation of its laws, both civil and criminal, and thereby and in consequence of said spoliation the complainant has lost millions of dollars' worth of its property under circumstances named in the succeeding paragraphs of this bill of complaint.

4. Your orator further shows that one Marcus Daly, who is now dead, but who was on the date and year aforesaid a citizen of the State of Montana, and a resident thereof, well knowing of the location of these lands, their accessibility, and the great value of the timber then growing thereon, did, on or about the 1st day of January, 1890, determine that he would convert and appropriate to his own use all of the merchantable and marketable timber growing and standing thereon, without buying said timber or obtaining any right or authority, except as hereinafter stated, from your orator, the United States of America. That in order
20 to more effectually carry out these designs and purposes, to conceal his identity, to enrich himself individually, to escape per-

sonal liability, and to better deceive the public and the lawful officers and agents of the complainant, he determined that he would organize a corporation under the laws of the State of Montana; and for that purpose the said Daly called to his aid and assistance certain other persons, namely, John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long, and by conspiracy and confederation with said parties, and in pursuance of such fraudulent purpose as aforesaid, they organized, on or about the 12th day of August, 1890, the Bitter Root Development Company, the defendant. In its articles of incorporation, which were duly filed with the secretary of the State of Montana, said John R. Toole, William Toole, and James W. Hamilton were named as incorporators, and James W. Hamilton, William Toole, Daniel J. Hennessy, John R. Toole, and William W. Dixon were named as trustees to manage the affairs of the company for the first three months of its existence, and the town of Hamilton, in said State, was named as the principal office of said corporation. The capital stock of said corporation was fixed at the sum of three hundred thousand dollars ($300,000.00), divided into one hundred thousand shares, of the par value of three dollars ($3.00) per share.

5. Your orator further shows that said incorporators and trustees
21 had but a nominal interest in said corporation, but certain of them were agents, and others attorneys of said Marcus Daly, and as such conspired with him as to the manner and means by which his said purpose to denude said lands of your orator could be best carried out. In pursuance of such conspiracy it was necessary that a certain number should subscribe for stock in said corporation, which was done, but all of said shares were in fact subscribed for the use of and controlled by said Marcus Daly. Your orator charges that not only in the formation of said corporation and other corporations to be hereinafter named said John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long aided and assisted said Marcus Daly, but in many other ways up to the time of his death they engaged with him in the work of spoliation, which, in pursuance of such conspiracy, had been planned and was later carried out as hereinafter particularly described; and said parties other than Daly participated in the profits thereof, but just how and to what extent is to your orator unknown; and your orator shows that such of the above as are not made defendants herein are either dead, outside of the jurisdiction of this court, or have no estate.

6. Your orator further shows that at once on the organization of this corporation, and under the corporate name thereof, said parties heretofore named commenced the work of cutting and carrying away from
22 said lands the trees and timber then growing and standing thereon, using at first in their operations several portable sawmills, but later, on or about the year 1892, a large lumber and sawmill was erected at the town of Hamilton, on Bitter Root River, in close proximity to a portion of the lands above described and the timber growing thereon. The work of cutting, hauling, transporting to the river, and driving the timber to said mill and manufacturing the same into lumber was prose-

cuted with great and unremitting industry for several years thereafter, to the great profit and advantage of the said conspirators and to the great loss of your orator.

7. Your orator further shows that not only at the time of the organization of said corporation, but at all times while it was doing business, its officers, directors, trustees, and stockholders acted for and in behalf of said Marcus Daly, as his agents, and had knowledge of its principal operations, and well knew that the logs that were being brought to its mill and converted into lumber were taken, without right or authority, from the public domain of your orator, and that they had no legal right or title to the same, except as to a small fraction thereof, as hereinafter stated.

8. Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by the other parties and as aforesaid, under the name of the Bitter Root Development Company,
23 did at certain times during the several years of said depredations apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and under cover of such permits said conspirators not only cut, carried away, and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, they willfully and fraudulently entered upon large tracts of lands adjacent thereto and cut, carried away, drove, and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown and known only to said Marcus Daly, his said agents, and the officers of said Bitter Root Development Company, and appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom beside said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time, it is impossible for your orator to say, as all books of account, of every kind and character, were then and are now in their possession, under their control, or with their assigns.

9. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and the other parties before mentioned engaged the services of a large number of men, falsely representing that they had authority from your orator to
24 cut the growing timber on tracts of land not included in any license, and made contracts with such men by the terms of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts and enable them to successfully prosecute the same.

10. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, the said Daly and his associates, acting through and under the corporate name of the defendant, Bitter Root

Development Company, entered into other contracts or agreements with other parties, namely, Kendall Brothers, Harper Brothers, G. L. Shook, William Toole, Andrew Kennedy, D. V. Bean, John Ailport, and divers other persons to your orator unknown, by the terms of which they were to be paid specified prices per thousand feet board measure for logs delivered at the sawmill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to your orator and was to be unlawfully cut and removed. Said contractors, so called, acting for and in behalf of said Marcus Daly and his said confederates, under the name of the Bitter Root Development Company, during the year 1891 and for several years next thereafter, willfully trespassed upon the hereinbefore-described lands of the complainant, cutting millions of feet of logs and hauling them to the Bitter Root River, and thence to the mill
25 of the defendant, Bitter Root Development Company, at Hamilton, where they were converted into lumber and sold to the general public, and the proceeds thereof appropriated in large part by said Marcus Daly and the balance by his associates in said conspiracy, but just how much, and in what proportion, your orator, for the reasons above stated, is unable to say.

11. Your orator further shows that the said Marcus Daly and his associates in further execution of said conspiracy organized other corporations for the purpose of concealing their illegal acts and complicating and confusing the situation, so as to make detection and proof of the same difficult, if not impossible. One of these schemes was as follows: On or about the 14th day of January, 1891, they organized a corporation known as the Anaconda Mining Company, with an organized capital stock of $12,500,000, divided into 500,000 shares of the par value of $25 per share; that within less than one year thereafter, namely, on the 5th day of December, 1891, a stockholders' meeting was held in the city of Butte, Montana, and at said meeting the capital stock of said corporation was increased to twenty-five million dollars ($25,000,000.00) and the shares thereof increased to one million (1,000,000) shares; that at said stockholders' meeting it appeared that no one of the incorporators or the trustees that were named at the time of its incorporation a few months before had any substantial interest therein; and later, namely, on the 31st day of December, another meeting of said stockholders was held, at which time it was voted to extend the term of existence of said
26 corporation for forty years from the date of its original incorporation, and at that meeting it appeared that Marcus Daly, either in his own person or as trustee or as a proxy, controlled nearly seven hundred thousand (700,000) shares of the million shares of the capital stock of said company, and in less than six months thereafter the capital stock was reduced from twenty-five million dollars ($25,000,000.00) to one million dollars ($1,000,000.00) and the shares from one million (1,000,000) to forty thousand (40,000).

12. Your orator further shows that in furtherance of the conspiracy aforesaid the said Marcus Daly on the 27th day of April, 1894, through his agents procured to be conveyed unto himself all of the property of said Bitter Root Development Company, receiving a deed from said Bitter Root Development Company, executed by William Toole as its president and Joseph Kerrigan as its secretary, which said deed was duly

recorded on page 302 of book 16 in the proper office for the recording of deeds in the county of Ravalli, State of Montana. In said deed appear these words: "The Bitter Root Development Company, for and in consideration of one dollar, transfers all of its property of every kind and description, real and personal, timber lands, timber-cutting privileges and rights, timber, logs, mills, water rights, and water ditches, flumes, pipe lines, and rights of way—in fact, everything belonging to the Bitter Root Development Company—to Marcus Daly."

Your orator further says that four days after so receiving this
27 deed, namely, on the 1st day of May, 1894, said Marcus Daly deeded this same property to the other of his corporations, the above-named Anaconda Mining Company, for the express consideration of one million four hundred and forty-two thousand three hundred and seventy-nine dollars and forty-six cents ($1,442,379.46), which said deed was duly recorded in said book 16, on page 280. Your orator expressly charges that said Marcus Daly did in fact receive the consideration named in said deed, the whole thereof being directly the result of the spoliation of the lands of your orator as aforesaid, and that the moneys so received by him belonged in fact to your orator; but your orator charges on information that said Marcus Daly did not receive all of the same in cash, but a portion of same was taken in stock in said Anaconda Mining Company, but just how much he received in cash and how much was carried over and appeared in stock of said company your orator is unable to state.

13. Your orator further shows that in furtherance of the conspiracy aforesaid, said defendants, Moses Kirkpatrick, William Scallon, and Malcolm B. Bromley, acting for and in behalf of said Marcus Daly, on the 6th day of June, 1895, pursuant to and in conformity with the statutes of Montana relating to corporations for industrial and productive purposes, organized the Anaconda Copper Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into three hundred thousand (300,000) shares of the par value of one hundred dollars ($100.00) each, with an authorized term of existence of forty
28 years, and the following-named persons were named as trustees for the first three months of its existence, to wit, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessey, and Joseph V. Long, with its principal office at Butte, Silverbow County, Montana.

14. Your orator further shows that nine days thereafter the same persons, named as incorporators of the corporation last named, organized under the same law the defendant corporation, the Anaconda Copper Mining Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into one million two hundred thousand shares (1,200,000) of the par value of twenty-five dollars ($25.00) each, with the same seven trustees to manage the affairs of said corporation for the first three months of its existence, with its principal office at Anacond*da*, in said State.

15. Your orator shows that in the execution of said conspiracy, and for the purpose of complicating the situation, said Marcus Daly, through his agents, did again, and within one year and twenty-nine days after having transferred his property to the Anaconda Mining Company, convey the identical property that was named in said deeds to the above-

named Anaconda Copper Mining Company for and in consideration of the sum of one dollar, the Anaconda Mining Company executing a deed through and by its president, W. W. Dixon, and its secretary, F. E. Sergeant, and said deed is recorded in the same book of records on page 441.

16. Your orator further shows and charges that these several conveyances were made in the main in furtherance of said conspiracy, and in pursuance of a purpose to so complicate the situation as to make detection difficult, if not impossible. That the conveyance by the Bitter Root Development Company to said Marcus Daly, for one dollar, of all of its property was fraudulent, and that said Marcus Daly did, under the name of the Anaconda Mining Company, carry on the same work of spoliation of your orator's trees, timber, and lands, and that later, and from the time of the conveyance of all its corporate property to the Anaconda Copper Mining Company, he carried on the work under that name until the date of his death. That he continued to use the same means, the same mill at Hamilton, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same. And your orator expressly charges that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Marcus Daly and his assistants to their own use and benefit; but just how much was carried over in the said corporations, and how much was divided previous to the last deed named herein, and how much of the property of your orator was converted by said last-named company between the date of its organization and the death of said Marcus Daly hereinafter described, and how much thereof was appropriated by said company and how much by Daly and his associates, it is impossible for your orator, with the means at hand, to state.

17. Your orator further shows that by reason of such spoliation, continued and carried on during the period of about ten years, it has lost property of great value, to wit, of the value of two million dollars and upwards, and that Marcus Daly and the other defendants named herein occasioned this loss by willfully trespassing upon said lands of your orator, and without its consent, or the consent of any of its authorized officers, and in violation of its laws, both civil and criminal, appropriated and converted to their own use the trees and timber growing thereon. That said defendants, or some of them, have had at all times and now have possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them; but by reason of the frauds practiced by said defendants, as aforesaid, and their acts performed for the express purpose of concealing from your orator the facts of the case by means of the formation and the dissolving and the re-forming of corporations, and by reason of said defendants having possession of all books of account it is impossible for your orator to set forth to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when and to whom the logs when manufactured into lumber were sold, or just when and by whom the proceeds thereof were obtained and when the same were divided.

31 18. Your orator further shows that at the time that these trespasses were committed the territory on which the same took place was but sparsely settled, and was thousands of miles away from the seat of government, and it was impossible with the means that your orator had at hand to properly patrol and protect its domain from the willful trespasses of the defendants, and that the Government of the United States used such care in the protection thereof as it had the means to do. That the agents employed by your orator were misled by the defendants' assertion of ownership, as aforesaid; that the frauds and trespasses of the defendants, which have resulted in the denuding of these lands of your orator and in depriving your orator of property of the value of several millions of dollars, were not discovered in their entirety until a comparatively short time ago.

19. Your orator further shows that it has commenced several actions at law in this honorable court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court, but that, by reason of the frauds and conspiracies above set forth and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given your orator by said actions at law, and your orator is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

32 20. Your orator further shows that Marcus Daly died in the city of New York on the 12th day of November, A. D. 1900; that at the time of his death he was a resident of the county of Deerlodge, State and district of Montana, and left an estate worth about $12,000,000, consisting of real and personal property located in said county and State and elsewhere. And your orator expressly charges that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator, as hereinbefore charged, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit; that in his lifetime he made and published his last will and testament whereby he appointed the defendant, Margaret P. Daly, executrix thereof; that on the 14th day of February, A. D. 1901, at the city of Anaconda, said last will and testament was duly proved and duly admitted to probate in the District Court of the county of Deerlodge, district of Montana; that thereupon, on the 15th day of February, A. D. 1901, letters of administration were duly issued thereon to the said defendant, Margaret P. Daly, by the said court; that the said defendant, Margaret P. Daly, duly qualified and entered upon the discharge of her duties as executrix, and that the said letters testamentary have not been revoked and are now in full force and effect.

21. Your orator further shows that the said Margaret P. Daly, under and by virtue of the terms of said will and as the wife of said Marcus Daly, is now the owner of a large portion of his estate.

33 In consideration whereof, and forasmuch as your orator is, for the reasons stated, remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relievable, to the end that your orator may have that relief which it can only obtain in a court of equity; and that each one of the defendants above

named may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator prays the court as follows:

First. That the defendant, Margaret P. Daly, both in her own person, and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for the use and benefit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

Second. That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains, and advantages which the said defendants, or either of them, have received or made or which have arisen or accrued to them, or either of them, by reason of the willful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

Third. That each of the defendants may make a full and true
34 discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under the direction and decree of this honorable court of all the dealings and transactions between your orator and the defendants. That on such accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon.

Fourth. That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the sawmill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits, and advantages which the said defendants, or either of them, or the estate of said Marcus Daly have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

Fifth. That the said defendants and each of them discover and
35 set forth full, true, and particular accounts of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their, use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from whom each and every of such sums were, respectively, received, and how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

Sixth. That the defendants, and each of them, may set forth a list or schedule and description of all books of account of every kind and char-

acter, and of all deeds, documents, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which are now or ever were in their or either of their possession or power, and more particularly described, which now are in their or either of their possession or power, and may deposit the same with the clerk of this court or with the standing master in chancery thereof for the purposes of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your
36 orator may ascertain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator as aforesaid, that this court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require and as may be agreeable to equity and good conscience.

May it please the court to grant to your orator a writ of subpœna to be directed to the said Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; Bitter Root Development Company, Anaconda Mining Company, Anaconda Copper Company, Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon, Daniel J. Hennessy, thereby commanding them, and each of them, at a certain time, and under a certain penalty to be fixed, personally to appear before this honorable court, and then and
37 there full, true, direct, and perfect answer to make to all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall be meet and agreeable to equity, and your orator will ever pray.

T. C. KNOX,
Attorney-General of the United States.

J. K. RICHARDS,
Solicitor-General of the United States.

FRED A. MAYNARD,
Special Assistant United States Attorney, Solicitor for Complainant.

CARL RASCH,
United States Attorney and Solicitor for Complainant.

M. C. BURCH,
Of Counsel.

No. 207. The United States of America. The Circuit Court of the United States for the Ninth Circuit and District of Montana. In equity. The United States of America, complainant, vs. Bitter Root Development Company, a corporation; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly,

deceased; John R. Toole; William W. Dixon; William Scallon,
38 and Daniel J. Hennessy, defendants. Filed Feb. 26, 1903. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 17th day of March, 1903, a subpoena in equity was issued herein, which is entered of final record, as follows, to wit:

Subpoena ad respondendum.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In equi

The President of the United States of America, greeting, to Bitter Root Development Company, a corporation; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon, and Daniel J. Hennessy, defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the court room in Butte, on the 6th day of April, A. D. 1903, to answer a bill of complaint exhibited against you in said court by the United States of America, complainant, and to do and receive what the said court shall have considered in that behalf. And this your are not to omit, under the penalty of five thousand dollars.

39 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of February, in the year of our Lord one thousand nine hundred and three, and of our Independence, the 127th.

[SEAL.] GEO. W. SPROULE, *Clerk*,
By
Deputy Clerk.

Memorandum pursuant to rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of April next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[SEAL.] GEO. W. SPROULE, *Clerk*,
By
Deputy Clerk.

P. C. KNOX,
United States Attorney-General.

J. K. RICHARDS,
Solicitor-General.

F. A. MAYNARD,
Special Assistant United States Attorney,
Solicitor for Complainant.

CARL RASCH,
United States Attorney, Helena, Montana.

M. C. BURCH,
Of Counsel.

40 UNITED STATES MARSHAL'S OFFICE,
District of Montana.

I hereby certify that I received the within writ on the 28th day of February, 1903, and personally served the same on the 3d day of March, 1903, by delivering to, and leaving with D. J. Hennessy, at Butte, Mrs. M. Daly, March 4th; Mrs. M. P. Daly, as executrix of the last will and testament of M. Daly, deceased, at Anaconda, Wm. Scallon, at Butte, March 10th, 1903, and the Anaconda Copper Mining Co., by Wm. Scallon, Prest., and on J. R. Toole, March 16, 1903, at Anaconda, Mont., said defendants named therein personally, in said district, a copy thereof; after due search am unable to find the Bitter Root Development Co., Anaconda Mining Company, The Anaconda Copper Co., and W. W. Dixon in my district.

C. F. LLOYD,
United States Marshal,
By E. D. ELDERKIN, *Deputy.*

BUTTE, *March 17, 1903.*

(Endorsed:) No. 207. U. S. Circuit Court, Ninth Circuit, District of Montana. In equity. United States of America vs. Bitter Root Development Co. et al. Subpoena. Filed March 17th, 1903. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 24th day of June, 1903, separate
41 demurrer of Anaconda Copper Mining Company, a corporation, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy was filed herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION); Anaconda Mining Company (a corporation); Anaconda Copper Company (a corporation); Anaconda Copper Mining Co. (a corporation); Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon; and Daniel J. Hennessy, defendants.
No. 207.
In equity.

Separate demurrer of Anaconda Copper Mining Company, a corporation; John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy.

Now comes the Anaconda Copper Mining Company, a corporation; John R. Toole, William W. Dixon, William Scallon, and Daniel
42 J. Hennessy, defendants in the above-entitled suit, and not confessing or acknowledging all or any of the matters or things in complainant's bill of complaint contained to be true in such manner and

form as the same are therein set forth and alleged, do separately and for themselves an' each of them demur to the bill of complaint of complainant therein, and for causes of demurrer show:

I.

That the said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that the complainant has a full, complete, and adequate remedy at law by action at law for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate, and complete remedy for any discovery necessary or practicable by proceeding in such action at law.

II.

That the complainant is not entitled to any discovery herein because:

(1) The bill shows upon its face that the complainant has a full, complete, and adequate remedy at law, and is therefore not entitled to any discovery.

(2) That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore defendants herein are not compellable to give any discovery herein or to answer said bill or to produce any papers, books, documents, or accounts relating to the matters and things stated
43 in said bill, because to do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3) The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4) The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants, or any of them, are parties to or defendants in an action at law relating to the matters set forth in the bill.

III.

The bill is so general, uncertain, and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor is it sufficiently averred how said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were
44 discovered or the means used to conceal the alleged frauds from the complainant; nor the diligence with which the alleged frauds were investigated by the complainant.

The bill contains mere loose, general, and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled, or injured by any acts of the defendants.

IV.

The bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it might be entitled instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want thereof, in relation to the matters stated in the bill.

V.

Said bill is uncertain and insufficient:

(1) As to the allegations of conspiracy and fraud on the part of
45 the defendants in that it is not shown what were the acts constituting the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the claimant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible or concealed from the complainant any facts in the case.

The allegations are general and indefinite, and do not state how the alleged frauds were perpetrated or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how the said frauds or any acts of the defendants were concealed from the complainant.

(2) It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants, or any of them, are parties or defendants to such alleged actions at law, or any of them.

(3) The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed lands or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or
46 licensed lands, as well as from other lands, although knowledge of such licenses or permits was and is peculiarly within the knowledge of the complainant.

(4) Said bill is in many other respects uncertain, informal, and insufficient.

VI.

And for further causes to be stated at the hearing of this bill.

Wherefore these defendants separately demur to said bill and to all of the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer thereto; and pray to be dismissed with their costs in this behalf sustained.

A. J. SHORES and
C. F. KELLEY,
Solicitors for said Defendants.

W. W. DIXON and
A. J. SHORES,
Of Counsel for said Defendants.

We certify that, in our opinion, the foregoing demurrer of the defendants, Anaconda Copper Mining Company (a corporation), John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, to the bill of complaint of the United States of America is well founded in point of law and proper to be filed in said cause.

W. W. DIXON and
A. J. SHORES,
Of Counsel for said Defendants.

47 THE UNITED STATES OF AMERICA,
Ninth Circuit, District of Montana,
State of Montana, County of Silver Bow, ss:

William W. Dixon, being duly sworn, says that he is one of the defendants to the bill of complaint of the United States of America in this suit, that he has read the foregoing demurrer, and that the same is not interposed for delay.

WILLIAM W. DIXON.

Subscribed and sworn to before me this 22d day of June, 1903.

[SEAL.] WILL HARDCASTLE,
Notary Public in and for Silver Bow County, State of Montana.

Service of the foregoing demurrer acknowledged, and copy received this 24th day of June, 1903.

CARL RASCH,
United States Attorney, Solicitors for Complainant.

(Endorsed:) No. 207. Circuit Court, United States, Ninth Circuit, District of Montana. United States of America, complainant, vs. Bitter Root Development Co. (a corporation), Anaconda Mining Company (a corporation), et al., defendants. Separate demurrer of Anaconda Copper Mining Company (a corporation), John R. Toole, W. W. Dixon, Wm. Scallon, and Daniel J. Hennessy. Filed June 24, 1903. Geo. W. Sproule, clerk.

48 And thereafter, to wit, on the 1st day of August, 1903, Margaret P. Daly, and Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, filed her separate demurrer herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE UNITED STATES OF AMERICA, complainant,
vs.
BITTER ROOT DEVELOPMENT COMPANY (a corporation), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Co. (a corporation), Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, defendants.
No. 207. In equity.

Separate demurrer of Margaret P. Daly and Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased.

49 Now comes Margaret P. Daly, for herself and as executrix of the last will and testament of Marcus Daly, deceased, defendants in the above-entitled suit, and not confessing or acknowledging all or any of the matters or things in complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, does for herself, and as such executrix, demur to the bill of complaint of complainant herein, and for causes of demurrer shows:

I.

That the said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that the complainant has a full, complete, and adequate remedy at law by action at law for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate, and complete remedy for any discovery necessary or practicable by proceeding in such action at law.

II.

That the complainant is not entitled to any discovery herein bacause:
(1) The bill shows upon its face that the complainant has a full, complete, and adequate remedy at law, and is therefore not entitled to any discovery.
(2) That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore defendants herein are not compellable to give any discovery herein, or to answer said bill, or to produce any papers, books,

documents, or accounts relating to the matters and things stated
50 in said bill, because to do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3) The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4) The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants, or any of them, are parties to, or defendants in, any action at law relating to the matters set forth in the bill.

III.

The bill is so general, uncertain, and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor is it sufficiently averred how said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were discovered, or the means used to conceal the alleged frauds
51 from the complainant; nor the diligence with which the alleged frauds were investigated by the complainant.

The bill contains mere loose, general, and indefinite allegations of fraud, and does not show the acts of the defendants by which the complainant alleges that it was deceived, misled, or injured by any acts of the defendants.

IV.

The bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal and equitable remedies to which it might be entitled instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want thereof, in relation to the matters stated in the bill.

V.

Said bill is uncertain and insufficient:

(1) As to the allegations of conspiracy and fraud on the part of the defendants, in that it is not shown what were the acts constitut-

52 ing the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant any facts in the case.

The allegations are general and indefinite, and do not state how the alleged frauds were perpetrated, or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how the said frauds or any acts of the defendants were concealed from the complainant.

(2) It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants or any of them are parties or defendants to such alledged actions at law, or any of them.

(3) The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed lands, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands as well as from other lands, although knowledge of such
53 licenses or permits was and is peculiarly within the knowledge of the complainant.

(4) Said bill is in many other respects uncertain, informal, and insufficient.

VI.

And for further cause to be stated at the hearing of this bill.

Wherefore the defendant, Margaret P. Daly, for herself and as executrix of the last will and testament of Marcus Daly, deceased, separately demurs to said bill and to all of the matters and things therein contained, and prays the judgment of this honorable court whether she shall be compelled to make any further or other answer thereto, and prays to be dismissed with her costs in this behalf sustained.

A. J. CAMPBELL,
Solicitors for Said Defendants.

_____,
Of Counsel for Defendants.

I hereby certify that in my opinion the foregoing demurrer of the defendants, Margaret P. Daly, and Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, to the bill of complaint of the United States of America is well founded in point of law, and proper to be filed in said cause.

A. J. CAMPBELL,
Of Counsel for Said Defendants.

54 THE UNITED STATES OF AMERICA,
Ninth Circuit, District of Montana, State of Montana, County of Ravalli, ss:

Margaret P. Daly, being duly sworn, says: That she is one of the defendants to the bill of complaint of the United States of America in this suit; that she has read the foregoing demurrer, and that the same is not interposed for delay.

MARGARET P. DALY.

Subscribed and sworn to before me this 29th day of July, A. D. 1903.
[SEAL.] ROBERT A. O'HARA,
Notary Public in and for Ravalli County, State of Montana.

Service of the foregoing demurrer acknowledged, and copy received this 31st day of July, A. D. 1893.

A. J. CAMPBELL,
Solicitors for Complainant.

(Endorsed:) No. 207. In the Circuit Court of the United States, Ninth Circuit, District of Montana. In equity. The United States of America, complainant, vs. Bitter Root Development Company, a corporation, et al., defendants. Separate demurrer of Margaret P. Daly, and Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased. Filed August 1, 1903. Geo. W. Sproule, clerk.

55 And thereafter, to wit, on the 26th day of February, 1904, an order sustaining said demurrers was duly made and entered herein, which is entered of final record, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

Friday, February 26th, 1904. In open court.

UNITED STATES OF AMERICA
vs.
BITTER ROOT DEVELOPMENT COMPANY ET AL.

Order sustaining demurrers.

This cause heretofore submitted to the court upon demurrers of defendants, Anaconda Copper Mining Company, a corporation, John R. Toole, W. W. Dixon, Wm. Scallon, and Daniel J. Hennessy, and Margaret P. Daly, and Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, came on regularly at this time for the judgment and decision of the court; and after due consideration it is ordered that said demurrers be, and the same hereby are, sustained, and complainant thereupon granted five days' time within which to further plead or consider as to further action herein.

Attest: A true and correct copy.

GEO. W. SPROULE, *Clerk.*

56 And thereafter, to wit, on the 3d of March, 1904, a final decree was duly made and entered herein, which is entered of final record, as follows, to wit:

THE UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Ninth Circuit and District of Montana.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION); Anaconda Mining Company (a corporation); Anaconda Copper Company (a corporation); Anaconda Copper Mining Company (a corporation); Margaret P. Daly; Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon; Daniel J. Hennessy, and Anaconda Copper Company (a corporation), defendants. } In equity.

Final decree.

In this cause the demurrers of the said defendants, Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, Anaconda Copper Mining Company, a corporation,
57 John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, to the said complainant's bill of complaint came duly on for hearing, and was argued by counsel for the respective parties, and the premises being seen and fully understood it is ordered, adjudged, and decreed by the court that said demurrers be and the same are hereby sustained; and the said complainant thereupon waiving in open court the right to further amend its said bill of complaint, it is thereupon further ordered, adjudged, and decreed by the court that said bill of complaint be and the same is hereby dismissed.

It appears from the return of the marshal that, after diligent search, no service of process could be had on said defendants, Bitter Root Development Company (a corporation), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), as they could not be found.

Dated March 3d, 1904.

HIRAM KNOWLES,
District Judge.

(Endorsed:) Title of court and cause. Order of dismissal. Filed and entered March 3d, 1904. Geo. W. Sproule, clerk.

Clerk's certificate to enrolled papers.

Wherefore, said pleadings, process, and final decree are entered of final record herein, in accordance with the law and practice of this court.

Witness my hand and the seal of said court this 3d day of March, 1904.

[SEAL.] GEO. W. SPROULE, *Clerk.*

58 And thereafter, to wit, on the 3d day of March, 1904, the complainant filed its assignment of error herein, which is in the words and figures as follows, to wit:

THE UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Ninth Circuit and District of Montana.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION); Anaconda Mining Company (a corporation); Anaconda Copper Company (a corporation); Anaconda Copper Mining Company (a corporation); Margaret P. Daly, Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon, and Daniel J. Hennessy, defendants.
} In equity.

Assignment of errors.

And now comes the complainant and says that in the record and proceedings of the said court in the *the* above-entitled cause, and in the final decree made and entered therein, on the 26th day of February,
59 A. D. 1904, there is manifest error, and for error the said complainant assigns the following:

First. The court erred in that it did not hold that the bill of complaint states a good cause of action to which the defendants should be required to file their answers or pleas.

Second. The court erred in holding that the bill of complaint states no cause for relief in a court of equity.

Third. The court erred in refusing to grant the relief as prayed for in complainant's bill.

Fourth. The court erred in sustaining the demurrers of defendants Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; Anaconda Copper Mining Company (a corporation); John R. Toole; William W. Dixon; William Scallon, and Daniel J. Hennessy, and directing that the bill of complaint be dismissed.

Fifth. The court erred in not overruling paragraph I of said demurrer, which states that the said bill of complaint does not state any such case as to entitle the complainant to any relief or discovery in equity, in that said bill shows that said complainant has a full, complete, and adequate remedy at law by action at law for the recovery of damages for the alleged wrongs of defendants, and also a full, adequate, and complete remedy for any discovery necessary or practicable by proceedings in such action at law.

Sixth. The court erred in not overruling paragraph II of said demurrer, which states that the complainant is not entitled to any discovery herein because:

60 (1) The bill shows upon its face that the complainant has a full, complete, and adequate remedy at law, and is therefore not entitled to any discovery.

(2) That said bill charges that the alleged wrongful acts of the defendants were in violation of both the civil and criminal laws of the United States; and therefore defendants herein are not compellable to give any discovery herein, or to answer said bill, or to produce any papers, books, documents, or accounts relating to the matters and things stated in said bill, because to do so might subject, or tend to subject, the defendants to a criminal prosecution or accusation or to a penalty or forfeiture.

(3) The bill alleges that some of the defendants were attorneys for some of the parties to this suit, and a discovery by such attorneys might compel them to violate professional confidences not allowed by law to be disclosed except under certain restrictions and conditions.

(4) The bill does not show that a discovery in this suit is sought in aid of any action at law, or that these defendants or any of them are parties to or defendants in any action at law relating to the matters set forth in the bill.

Seventh. The court erred in not overruling the third paragraph of said demurrer, which states that the bill is so general, uncertain, and indefinite that it states no equitable grounds for relief or discovery, and these defendants should not be compelled to answer the same, in
61 that the bill does not show how any of the alleged acts of defendants were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any of the alleged acts of the defendants, or how any acts of the defendants complicated the situation or made detection difficult or impossible, or concealed from the complainant any facts in the case; nor that it is sufficiently averred how said frauds were perpetrated or the alleged fraudulent acts committed; nor why the alleged frauds were not sooner discovered by the complainant, or how or when such frauds were discovered or the means used to conceal the alleged frauds from the complainant; nor the diligence with which the alleged frauds were investigated by the complainant.

Eighth. The court erred in not overruling the fourth paragraph of said demurrer which states that the bill shows upon its face that the complainant has been guilty of laches in not sooner commencing legal or equitable proceedings to enforce its alleged rights, in that the alleged wrongs of the defendants were committed long since, and were within the knowledge of the complainant, or it had the means of knowledge thereof, and no sufficient reason or excuse is given or pleaded why the complainant has not long since availed itself of the proper legal
62 and equitable remedies to which it might be entitled instead of delaying proceedings until, as shown by the bill, many of the parties having knowledge of the matters complained of have died or gone out of the jurisdiction of the court.

No diligence on the part of the complainant is shown, or any excuse for the want thereof, in relation to the matters stated in the bill.

Ninth. The court erred in not overruling the fifth paragraph of said demurrer, which states that said bill is uncertain and insufficient:

(1) As to the allegations of conspiracy and fraud on the part of the

defendants, in that it is not shown what were the acts constituting the conspiracy and fraud, nor how the said alleged acts were fraudulent, or how the complainant was injured thereby, or how the complainant or its officers or agents were deceived or misled by any alleged acts of the defendants, or how any acts of the defendants complicated the situation, or made detection difficult or impossible, or concealed from the complainant any facts in the case.

That the allegations are general and indefinite, and do not state how the alleged frauds were perpetrated, or how the complainant was injured thereby, or when the complainant discovered the same, or that it used any diligence to discover them, or how said frauds or any acts of the defendants were concealed from the complainant.

(2) It is alleged in the bill that the complainant has commenced several actions at law in this court to recover the value of timber taken
63 by the defendants from the lands mentioned in the bill, and that the same are now pending in this court; but said actions are not described, nor the parties thereto named, nor is it alleged that these defendants or any of them are parties or defendants to such alleged actions at law, or any of them.

(3) The bill admits that the defendants, or some of them, had permits or licenses from the complainant or its agents to cut timber from some of the lands described in the bill; but the bill does not describe such permitted or licensed lands, or exclude them from the bill, but seeks to hold the defendants liable for the timber cut from said permitted or licensed lands as well as from other lands, although knowledge of such licenses or permits was and is peculiarly within the knowledge of the complainant.

(4) Said bill is in many other respects uncertain, informal, and insufficient.

Wherefore, the complainant prays that the said decree be reversed.

P. C. KNOX,
Attorney-General of the United States,
M. C. BURCH,
United States Attorney,
CARL RASCH,
United States Attorney for the District of Montana,
FRED A. MAYNARD,
Special Assistant United States Attorney for the District of Montana,
Solicitors for Complainant.

64 (Endorsed:) Title of court and cause. Assignment of errors. Filed and entered March 3d, 1904. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 3d day of March, 1904, an order granting appeal was filed herein, being as follows, to wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States for the District of Montana, Ninth Circuit.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION); Anaconda Mining Company (a corporation); Anaconda Copper Mining Company (a corporation); Anaconda Copper Company (a corporation); Margaret P. Daly; Margaret P. Daly, executrix of the last will and testament of Marcus Daly, deceased; John R. Toole, William W. Dixon; William Scallon, and Daniel J. Hennessy, defendants.
} In equity.

Order granting appeal.

The above-named complainant, conceiving itself aggrieved by
65 the decree made and entered on the 26th day of February, A. D. 1904, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit of Appeals for the Ninth Circuit.

Dated March 3d, A. D. 1904.

P. C. KNOX,
Attorney-General of the United States.
M. C. BURCH,
United States Attorney.
CARL RASCH,
United States Attorney for the District of Montana.
FRED A. MAYNARD,
Special Assistant United States Attorney for the District of Montana, Solicitors for Complainant.

The foregoing claim of appeal is allowed.

HIRAM KNOWLES,
United States District Judge for the District of Montana.

(Endorsed:) Title of court and cause. Order granting appeal. Filed and entered March 3d, 1904. Geo. W. Sproule, clerk.

66 And thereafter, to wit, on the 3d day of March, 1904, a citation was duly issued herein, being in the words and figures as follows, to wit:

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, the Anaconda Copper Mining Company (a corporation), John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, and Albert J. Campbell, solicitor for Margaret P. Daly and Margaret P. Daly, executrix, and W. W. Dixon, A. J. Shores, and C. F. Kelly, solicitors and of counsel for the other defendants.

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in the city of San Francisco, State of California, on the 28th day of March, A. D. 1904, pursuant to an appeal on the part of the United States filed in the clerk's office of the Circuit Court of the United States for the District of Montana, entitled The United States of America, complainant, vs. Bitter Root Development Company (a corporation), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Company (a corporation), Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon,
67 and Daniel J. Hennessy, defendants to show cause, if any there be, why the decree of the Circuit Court of the United States in the said appeal mentioned should not be reversed and speedy justice should not be done in that behalf.

Given under my hand at the city of Butte, in the District of Montana, on the 2d day of March, A. D. 1904.

HIRAM KNOWLES,
District Judge.

Service of the above citation accepted by us this 3d day of March, A. D. 1904.

W. W. DIXON,
A. J. SHORES, and
C. F. KELLEY,
For the Anaconda Copper Mining Company, John R. Toole, W. W. Dixon, William Scallon, Daniel J. Hennessy.

A. J. CAMPBELL,
For Margaret P. Daly and Margaret P. Daly, executrix.

(Endorsed:) No. 107. In equity. Circuit Court of United States, 9th Circuit, Dist. of Montana. United States vs. Bitter Root Development Company et al. Citation. Filed March 3, 1904. Geo. W. Sproule, clerk.

Clerk's certificate to transcript.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, George W. Sproule, clerk of the United States Circuit Court
68 for the District of Montana, do hereby certify and return to the honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 73 pages, numbered consecutively from 1 to 73, is a true and correct transcript of the pleadings, process, orders, decrees, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of twenty-one 10/100 dollars and has been charged to the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 8th day of March, 1904.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 1047. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, appellant, vs. Bitter Root Development Company (a corporation), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Company (a corporation), Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, appellees. Transcript of record. Upon appeal from the United States Circuit Court for the District of Montana. Filed March 14, 1904. F. D. Monckton, clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE BITTER ROOT DEVELOPMENT COMPANY, a corporation, et al., appellees. } No. 1047.

Certificate of clerk U. S. Circuit Court of Appeals to printed transcript of record.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-eight (68) pages, numbered from one (1) to sixty-eight (68), inclusive, including the index and covers thereto, to be a true copy of the printed transcript of record upon appeal from the United States Circuit Court for the District of Montana in the above-entitled case, and that the same was printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, this 28th day of March, A. D. 1905.

[SEAL.] F. D. MONCKTON, *Clerk.*

70 *Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.*

71 At a stated term, to wit, the October term, A. D. 1903, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of Francisco, on Thursday the twenty-sixth day of May, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE BITTER ROOT DEVELOPMENT COMPANY, a corporation, et al., appellees. } No. 1047.

Order of submission.

Ordered, appeal argued by Fred A. Maynard, esquire, counsel for the appellant, and L. O. Evans, esquire, counsel for the appellees, and submitted to the court for consideration and decision, with leave to counsel for the appellees to file further brief within five (5) days.

72 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY (a corporation); Anaconda Mining Company (a corporation); Anaconda Copper Mining Company (a corporation); Margaret P. Daly; Margaret P. Daly as executrix of the estate of Marcus Daly, deceased; Jorn R. Toole; William W. Dixon; William Scallon; and Daniel J. Hennessy, appellees. } No. 1047.

Opinion U. S. Circuit Court of Appeals.

Appeal from the United States Circuit Court for the District of Montana.

The appellant was the complainant in a bill in equity filed in the Circuit Court of the United States for the District of Montana, against the appellees herein as defendants. The substance of the bill was as follows: That on April 1, 1888, the appellant owned certain public lands in the State of Montana, which are described in the bill, comprising many thousands of acres, some of which were surveyed, and others of which were unsurveyed; that on said date there were growing and standing on said

lands forest of pine and fir and other trees fit to manufacture into lumber, which standing timber was of the value of more than $2,000,000; that at the date of filing the bill said lands had for the most part been stripped of such timber, and except very small portions thereof were denuded of timber without license or authority or permission of the United States
73 or anyone authorized to represent the appellant, and that in consequence of such spoliation the appellant has lost millions of dollars' worth of its property; that one Marcus Daly, now deceased, a citizen and resident of the State of Montana, did on or about January 1, 1889, determine to convert and appropriate to his own use all the merchantable and marketable timber growing and standing on the said lands without buying the same or obtaining any right or authority except as in the bill hereinafter stated; that in order to carry out his designs and to conceal his identity and escape personal liability, and to deceive the public and the officers of the appellant, he, with the aid of certain named persons, on about August 12, 1890, organized, under the laws of the State of Montana, the Bitter Root Development Company, of which Jorn R. Toole, William Toole, and James W. Hamilton were named as incorporators, and they, and Daniel J. Hennessey and William W. Dixon were named as trustees to manage the affairs of the company for the first three months of its existence; that the capital stock of the corporation was fixed at the sum of $300,000; that said incorporators and trustees had but a nominal interest in the corporation, but certain of them were agents, and others attorneys, of said Marcus Daly, and with him they conspired to denude said lands of their timber; that all of the stock of said corporation was subscribed for the use of and controlled by the said Marcus Daly, and that said named persons, together with Moses Kirkpatrick, William Scallon, Malcomb B. Bromley, Michael Donohue, William L. Hoag, and Joseph B. Long, aided and assisted said Marcus Daly up to the time of his death in the work of spoliation which, in pursuance of said conspiracy, had been planned; that said parties other than Daly participated in the profits, but to what extent it is unknown to the appellant; that such of the said parties as are not made defendants to the bill are either dead or out of the jurisdiction of the court, or insolvent; that immediately upon the organization of the corporation, and under
74 the corporate name thereof, said parties so named commenced the work of cutting and carrying away from said lands the growing and standing timber thereon, using at first several portable sawmills and later a large lumber sawmill at the town of Hamilton, and carried on said work with unremitting industry for several years; that at all such times the officers, directors, trustees, and stockholders of said corporation acted for and in behalf of said Marcus Daly, as his agents, and had knowledge that said timber was being cut without right or authority from the public domain, except as to a small fraction thereof as hereinafter stated; that in pursuance of such fraudulent conspiracy and concealment of the same, the said conspirators, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations obtain from the appellant licenses to cut certain timber on small portions of the tracts in the bill described, and under cover of such permits they cut and carried away and manufactured not only the timber growing on the lands included in such licenses, but they willfully and fraudulently entered upon large tracts of land

adjacent thereto, and cut and carried away the timber growing thereon, and afterwards cut and sold the lumber to persons unknown to the appellant, but known only to said Daly and the officers and agents of said corporation; that they appropriated the proceeds of the same to their own use; that just when such sales were made, how much the proceeds were, to whom paid, in what proportion, and at what particular times, the appellant is unable to say; that in further execution of said conspiracy the said Daly and his associates organized other corporations, for the purpose of concealing their illegal acts and to make detection and proof of the same difficult, if not impossible; that on January 14, 1891, they organized the corporation known as the Anaconda Mining Company, with a capital stock of $12,500,000, divided into 500,000 shares; that on December 5, 1891, the capital stock of
75 said corporation was increased to $25,000,000; that at the stockholders' meeting at which this was done it appeared that no one of the incorporators or trustees that were named at the time of the incorporation had any substantial interest therein, and that on December 31st of that year another meeting of the stockholders was held, at which it was voted to extend the term of existence of said corporation for forty years. At that meeting it appeared that Marcus Daly, either in his own person or as trustee or by proxy, controlled over 700,000 of the million shares of said capital stock, and in less than six months thereafter said capital stock was reduced from $25,000,000 to $1,000,000, and the number of shares from 1,000,000 to 40,000; that in furtherance of said conspiracy the said Daly, on April 27, 1894, through his agents procured to be conveyed unto himself all the property of said Bitter Root Development Company; that in the deed of transfer it appeared that said company, for and in consideration of one dollar, transferred all its property of every kind and description, real and personal, timber lands, timber-cutting privileges, and rights, etc., in fact everything belonging to the Bitter Root Development Company to Marcus Daly; that four days later Daly deeded the same property to the Anaconda Mining Company for the express consideration of $1,442,379.46; that said Daly did in fact receive said named consideration, the whole thereof being the result of the spoliation of the lands of the appellant as aforesaid; that the money so received by him belonged in fact to the appellant, but that in fact said consideration was not all paid in cash, but a portion of the same was stock in said Anaconda Mining Company; but how much was cash and how much was stock the appellant is unable to state; that in furtherance of said conspiracy, on June 6, 1895, the defendants, Kirkpatrick, Scallon, and Bromley, acting for and in behalf of said Daly, organized under the laws of the State of Montana the Anaconda Copper Company, with an organized
76 capital stock of $30,000,000, consisting of 300,000 shares, and for the first three months of its existence the said Kirkpatrick, Scallon, Bromley, Donahue, Hoag, Hennessy, and Long were named as trustees; that nine days thereafter the same persons organized under the laws of said State the Anaconda Copper Mining Company, with an organized capital stock of $30,000,000, consisting of 1,200,000 shares, with the same set of trustees to manage its affairs for the first three months of its existence; that in the execution of said conspiracy, and for the purpose of complicating the situation, said Daly, through his agents, within one year and twenty-nine days after having transferred his prop-

erty to the Anaconda Mining Company, conveyed the identical property named in the deed to that corporation to the said Anaconda Copper Mining Company for and in consideration of the sum of one dollar; that these several conveyances were made in the main in furtherance of said conspiracy, and for the purpose of so complicating the situation as to make detection difficult, if not impossible; that the conveyance by the Bitter Root Development Company to Daly of all its property for the consideration of one dollar was fraudulent, and that the said Daly did in the name of the Anaconda Copper Mining Company carry on the same work of spoliation of the timber on said lands from the time of the conveyance of said property to said last-named corporation, until the date of his death; that he continued to use the same means and the same mill, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same; that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Daly and his assistants to their own use and benefit; but how much was carried over into the said corporations, and how much was divided previous to the last deed so referred to, and how much
77 of the property of the appellant was converted by said last-named corporation, and how much thereof was appropriated by said company and how much by Daly and his associates, it is impossible for the appellant to state; that by reason of such spoliation carried on during a period of about ten years, the appellant has lost property of the value of $2,000,000 and upwards, and that said Marcus Daly and the other defendants named in the bill occasioned this loss by wilfully trespassing on the lands of the appellant, without its consent, and in violation of law, and that they appropriated and converted to their own use the trees and timber growing thereon; that said defendants or some of them have at all times had, and now have, possession of the said sawmill, and they have received all proceeds from the sale of lumber, and divided the same among themselves; but by reason of the frauds so practiced, and their concealment, and by reason of said defendants having possession of all books of account, it is impossible for the appellant to set forth to a greater extent the details of the conspiracy, or to show when and by whom the particular acts of spoliation were performed, or just when and to whom the lumber was sold, or when and by whom the proceeds thereof were received; that owing to the sparsely settled condition of such lands and the imperfect means of the appellant to patrol and protect the same, said frauds and trespasses were not discovered until a comparatively short time before the filing of the bill.

The bill contains this averment: "Your orator further shows that it has commenced several actions at law in this honorable court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court, but that by reason of the frauds and conspiracies above set forth, and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given
78 your orator by said actions at law, and your orator is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable."

The bill further alleges that Marcus Daly died on the 12th day of November, 1900, and left estate of the value of about $12,000,000, in Montana and elsewhere; that a large portion of said estate was the result and proceeds of said illegal acts; that he died testate, having named the defendant, Margaret P. Daly, his executrix; that his will was duly admitted to probate in the District Court of the county of Deer Lodge, in Montana, and letters of administration were duly issued thereon to the said Margaret P. Daly, and that she is now the acting executrix; that said Margaret P. Daly, under and by virtue of the terms of said last will, is now the owner of a large portion of said estate.

The bill then prays for equitable relief: First, that Margaret P. Daly, both in her own person and as executrix, and each of the appellees, be decreed to hold in trust for the use and benefit of the appellant so much of their estate, both real and personal, as shall have come to them directly from the proceeds of the sale of said timber; second, that the appellant recover from said appellees the profits and gains and advantages which they have received or made by reason of said wilful trespasses and fraudulent conversion of said timber; third, that each of said appellees make a full and true discovery and disclosure of and concerning the transactions aforesaid, and that an accounting be taken of all said dealings between the appellant and the appellees; that on said accounting the appellees be required to produce all licenses, permits, and all other documents of every kind and character, which they may have received from the appellant, or by which they claim the right to enter upon any of said lands, or to cut the timber therefrom; fourth, that they account for the number of logs re-
79 ceived by them and manufactured into lumber at their said mill, or at any other mill owned or used by them; also the gains, profits, and advantages which have accrued to them from trespassing on said lands and converting said timber to their own use; fifth, that they account for all sums received on sales of such timber; sixth, that they set forth a list and description of all books of account, deeds, stock books, letters, papers, or writings relating to the matters aforesaid, or any of them, and that they deposit the same with the clerk of the court for the purpose of inspection by the appellant and for all other legitimate and usual purposes; that upon such accounting the appellees be required to pay to the appellant all money derived by them from their participation in the conspiracy aforesaid, with interest thereon, and for such further relief as pertains to equity.

A demurrer was interposed to the bill for want of equity, and upon the further ground that the complainant therein had a full, complete, and adequate remedy at law for the recovery of damages for the alleged wrongs, and also a full, complete, and adequate remedy at law for any discovery necessary or practicable in aid of an action at law.

P. C. Knox, Attorney-General; M. C. Burch, Special Assistant Attorney-General; Carl Rasch, U. S. district attorney; Fred A. Maynard, special assistant U. S. attorney, for appellant.

W. W. Dixon, A. J. Campbell, A. J. Shores, C. F. Kelley, John F. Forbis, and L. O. Evans, solicitors for appellees.

Before Gilbert, Ross, and Morrow, circuit judges.

80 Gilbert, circuit judge, after stating the case as above, delivered the opinion of the court.

The bill sets forth a series of trespasses, continuing over a period of some ten years, which are alleged to have been committed by all of the defendants jointly. The appellant had its remedy in such a case by an action of trespass to recover damages based upon the value of the standing timber when taken or, if the trespass was knowingly and wrongfully committed, by an action in the nature of trover to charge the appellees with the value of the timber as manufactured into lumber. Woodenware Co. v. United States, 106 U. S., 432. But the appellant, while admitting that it has a remedy at law to obtain redress for the acts complained of, denies that such remedy is as plain, speedy, or adequate as the remedy afforded by a suit in equity. The inadequacy of the legal remedy is said to consist in the trouble and difficulty of unraveling before a jury the devious and confusing methods adopted by the appellees in creating corporations and in transferring property from one to the other thereof, and other devices to cover their tracks, and that these methods and devices may only be brought to light through an inspection of the books and records of those corporations. It is not denied that inspection of all of these books and records may be obtained in an action at law, but the contention is that it would be more convenient to present such complicated evidence in a suit in equity. But the greater convenience of the equitable remedy is no ground in itself for resorting to equity, or for depriving a party of his constitutional right to a jury trial. The controlling consideration is whether the equitable remedy will afford more complete or effectual relief in kind or degree than the legal remedy. If the remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity," it must be pursued. Insurance Company v. Bailey, 13 Wall., 616; Buzard v.
81 Huston, 119 U. S., 347, and cases there cited; Scott v. Neely, 140 U. S., 106, 110.

It is contended that the bill presents several grounds for equitable relief, one of which is the jurisdiction of a court of equity in matters of accounting. This, it is true, is one of the established grounds of equitable jurisdiction in cases where it is shown that an accounting can not be fairly and adequately had in a court of law, or where there are fiduciary relations between the parties, or where the accounting is incident to recognized equitable relief sought by the bill. But there are no accounts in this case between appellant and appellees. The cause of action, as set forth in the bill, arises wholly in tort. A cause of action arising in tort can not be converted into a cause of action on an account at common law. Sandeen v. K. Cy. & St. Jo. R. R. Co., 79 Mo., 278; Albertson v. Grier, 4 Houst. (Del.), 541; Western & Atlantic R. R. Co. v. Mead & Co., 4 Snead, 107; Spencer v. Hewitt, 22 Ga., 426; A. T. & S. F. R. R. Co. v. Wilkinson, 55 Kas., 83. Nor can the appellant, by resorting to equity, convert its cause of action which arises on the facts disclosed in the bill into a suit in equity for an accounting. In addition to this, no facts are alleged in the bill to show the necessity for an accounting. It is not alleged in the bill that an accounting is necessary to enable the appellant to ascertain the quantity of timber that has been wrongfully cut from the premises described therein. It is not even alleged that the desired accounting will develop such proof, nor is it alleged that the appellees

cut no timber from lands other than those so described, or that they received no logs from other sources. The prayer of the bill in this connection is that the plaintiff recover from the defendants the profits, gains, and advantages which they have received or made by reason of the said trespasses and conversion of timber so cut. The relief so prayed for is not obtainable upon the facts alleged by any form of suit or action. The right of the appellant is confined to damages for trespass, or dam-
82 ages recoverable in an action in the nature of trover, in an amount to be based upon the actual value of the manufactured product, and not upon the basis of the amounts, gains, and profits received by the appellees.

But it is said that the bill presents a case of mutual accounts. This is asserted upon the theory that the appellant had granted to the appellees licenses to cut timber on small portions of the tracts described in the bill, of which licenses the appellees took advantage to wrongfully cut timber from adjacent lands. How this presents a case of mutual accounts, we are unable to see. The acts with which the appellees are charged are a series of torts. As to the lands on which licenses were given to cut timber, no demand for damages for such cutting can arise in favor of the appellant, and as to those lands no relief is sought. Those transactions can occupy no place in an accounting.

It is claimed that the bill may be sustained on the ground that it is brought to establish a trust. The cases of Newton v. Porter, 69 N. Y., 133, and The American Sugar Refining Co. v. Fancher, 145 N. Y., 552, are cited to sustain the doctrine that such a trust may arise through a tort. In the first of those cases it was held that the owner of negotiable securities stolen and afterwards sold by the thief might follow and claim the proceeds in the hands of a felonious taker, and that this right attached to any securities or property in which the proceeds may have been invested, so long as such proceeds can be traced and identified. But in that case the original tort feasor was insolvent. There was no remedy at law. No redress was possible unless the owner could proceed in equity to charge with a trust the property in which the stolen securities were invested. So in the case of The American Sugar Refining Co. v. Fancher, the sale of personal property had been induced by fraud on the part of the vendee, and the property was by him sold to another.
83 The proceeds of the sale were specifically identified in the hands of the latter. Since the vendee was wholly insolvent, it was held that a court of equity had a remedy to reach such proceeds and apply them for the benefit of the defrauded vendor. No such facts are presented in the present case. It is not alleged that any of the defendants are insolvent. On the contrary, it is shown that the estate of Marcus Daly, who, according to the allegations of the bill, was the initiator and principal actor in all the trespasses so complained of, and who, as one of the joint tort feasors, would be chargeable with the whole of the damages recoverable on account thereof, amounts to $12,000,000. Nor is it alleged in the bill that the profits fraudulently obtained by the appellant through the tort complained of have been invested or are now discoverable in any particular form of property which might be charged with a trust in invitum.

It is said that on the allegations of the bill the appellant is entitled to a discovery. But the appellant's remedy having been, as we have seen, an action at law, there is no necessity for resorting to equity to procure discovery in aid thereof. It has been held that in ordinary cases a pure bill of discovery can not be maintained in the equity courts of the United States for the reason that section 724 of the Revised Statutes renders it no longer necessary. Ex parte Boyd, 105 U. S., 647; Rindskopf v. Platto, 29 Fed., 130; United States v. McLaughlin, 24 Fed., 823; Preston v. Smith, 26 Fed., 885; Paton v. Majors, 46 Fed., 210. Section 724 of the Revised Statutes enables a plaintiff in an action at law to obtain in that action all discovery of books, papers, and documents as fully as it could be done in a suit in equity. Again, it is the settled rule that the Federal courts are without jurisdiction of a suit for the discovery of evidence to be used in the enforcement of a legal demand. In Scott v. Neely, 140 U. S., 106, the court said: "The Constitution in its seventh amendment declares that in suits at common law where the value
84 in controversy shall exceed twenty dollars the right of trial by jury shall be preserved. In the Federal courts this right can not be dispensed with except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact." In Safford v. Ensign Mfg. Co., 56 C. C. A., it was held that a Federal court is without jurisdiction of a suit in which discovery and relief are sought; but the only ground for equitable relief appears to be the discovery of evidence to be used in the enforcement of a purely legal demand.

It is contended that the bill may be sustained for the reason that Margaret P. Daly is sued as executrix of the estate of Marcus Daly, deceased. It is true that courts of equity have exercised jurisdiction over controversies in which executors and administrators are parties defendant. But it is only in cases where such personal representatives are to be considered trustees for the heirs, legatees, devisees, or creditors. According to the allegations of the bill, Margaret P. Daly is not a trustee for the appellant. The appellant presents a claim for unliquidated damages. Margaret P. Daly is made a party defendant only for the reason that she is the personal representative of Marcus Daly, who was the principal tort feasor, according to the averments of the bill. She has the same right to a trial by jury that her husband would have had, if living. There was no charge of fraud against Margaret P. Daly, as executrix, and no discovery of the assets of the estate in her hands is required. According to the bill, she is possessed of ample funds to meet the
85 whole of the demand of the appellant.

The decree of the Circuit Court is affirmed.

(Endorsed:) Opinion. Filed Nov. 7, 1904. F. D. Monckton, clerk.

86 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE BITTER ROOT DEVELOPMENT COMPANY, A CORPORATION; The Anaconda Mining Company, a corporation; The Anaconda Copper Company, a corporation; The Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; Willliam W. Dixon; William Scallon; and Daniel J. Hennessy, appellees. } No. 1047.

Decree U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of of Montana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the district of Montana, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered November 7, 1904. F. D. Monckton, clerk.

87 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY, A CORPORATION; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon; and Daniel J. Hennessy, appellees.

The above-mentioned appellant, United States of America, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the 7th day of November, A. D. 1904, affirming the decree of the Circuit Court of the United States for the district of Montana, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has not the power to enter final decrees or judgments, but it is a cause embraced within the last clause of section 6 of the judiciary act of March 3, 1891, and which provides as follows: "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error, or review of the case by the Supreme Court of the United States,

where the matter in controversy shall exceed one thousand dollars besides costs."

88 Wherefore the said appellant prays that an appeal be allowed it in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WILLIAM H. MOODY,
Attorney-General of the United States.
M. C. BURCH,
Sp'l Ass't Atty. General of the United States.
CARL RASCH,
U. S. Attorney for the District of Montana.
FRED A. MAYNARD,
Special Ass't U. S. Atty. for the District of Montana.

Dated March 3d, 1905.

(Endorsed:) Prayer for appeal to the Supreme Court of the U. S. Filed March 13th, 1905. F. D. Monckton, clerk.

89 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED OF AMERICA, APPELLANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY, a corporation; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly as Executrix of the Last Will and Testament of Marcus Daly, deceased; John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, appellees.

Assignment of errors.

And now comes the appellant, the United States of America, and says that in the record and proceedings of the said court in the above-entitled cause, and in its final judgment affirming the decree of the Circuit Court for the District of Montana, made and entered therein on the 7th day of November, A. D. 1904, there is manifest error, and that the United States Circuit Court of Appeals for the Ninth Circuit erred in this, to wit:

First. In holding and deciding that the bill of complaint states no cause for relief in a court of equity.

Second. In refusing to grant the relief as prayed for in complainant's bill.

Third. In affirming the decree of the Circuit Court for the District of Montana, which decree sustained the demurrers to the bill interposed by the defendants, one of which said demurrers was that the bill shows that the complainant has a full, complete, and adequate remedy at law.

90 Fourth. In holding and deciding that complainant's remedy at law is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Fifth. In holding and deciding that the bill of complaint shows that there are no accounts in this case between the parties thereto, but that the cause of action as set forth in the bill arises wholly in tort.

Sixth. In holding and deciding that no facts are alleged in the bill to show the necessity for an accounting.

Seventh. In holding and deciding that it is not alleged in the bill that an accounting is necessary to enable the appellant to ascertain the quantity of timber that has been wrongfully cut from the premises described therein.

Eighth. In holding and deciding that the allegations of complainant's bill as contained in its eighth paragraph as follows: "That said Marcus Daly aided by the other parties, as aforesaid, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations, apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described and under cover of said permits, said conspirators not only cut, carried away and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, wilfully and fraudulently entered upon large tracts of land adjacent thereto, and cut, carried away, drove and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown, and known only to said Marcus Daly, his said agents, and the officers of said Bitter Root Develop-
91 ment Company, and appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom besides said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time, it is impossible for your orator to say, as all books of accounts of every kind and character were then, and are now, in their possession, under their control or with their assigns, when read in connection with the third prayer of complainant's bill, "That each of the defendants make a full and true discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under the direction and decree of this Honorable Court of all the dealings and transactions between your orator and the defendants. That on such accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon," does not state a case cognizable in equity, and no necessity for an accounting, "as the acts charged are simply a series of torts."

Ninth. In so holding and deciding the court erred in that it wholly ignored and refused or neglected to consider the act of Congress under which said licenses or permits were issued, and the rules and regulations of the Secretary of the Interior as contained in and made a part of said licenses or permits, which, among others, expressly provide that the

holders of such licenses or permits shall report to the proper land officers of the United States, and account each month to them for the timber so cut under such permits or licenses.

92 Tenth. The court erred in refusing to hold that on a case as presented by the facts set forth in the bill the law will raise a trust in invitum out of the transaction, in order that the substituted property resulting from the proceeds of said acts may be subjected to the purposes of indemnity and recompense; and that in such a case equity is the proper forum.

Eleventh. The court erred in not holding and deciding that it is evident from the facts stated in the bill, that the timber belonging to the Government having been converted into money by the defendants, and by them invested in so many different ways, and so many varied interests and so many complications having resulted from their fixed purpose to make detection impossible, that it is evident that the matter is beyond the reach of any strict legal remedy, and only within the comprehensive scope of a bill in equity where all the parties can be brought in and every right protected, so as to adjust and determine the entire merits of the case.

Twelfth. The court erred in not holding and deciding that the complainant was entitled to the discovery sought and prayed for in its bill.

Thirteenth. The court erred in decreeing that the defendant, Margaret P. Daly, both in her own person and as executrix of the last will and testament of said Marcus Daly, deceased, is not, and, according to the allegations of the bill, could not be charged and held as a trustee for the use and benefit of the United States for so much of the estate of said Marcus Daly as shall have come to her directly from the proceeds of the conversion by said Marcus Daly of timber belonging to the United States.

93 Fourteenth. The court erred in decreeing that the other defendants named in the bill of complaint are not and could not, according to the allegations of the bill, be charged and held as trustees for the use and benefit of the United States for so much of the proceeds of said conversion as shall have come to each one of them.

Fifteenth. The court erred in holding and deciding that the appellant is not authorized to invoke the aid of equity by reason of the frauds practiced by Marcus Daly and his assistants.

Wherefore the said appellant prays the honorable court to examine and correct the errors assigned, and for a reversal of the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case.

WILLIAM H. MOODY,
Attorney-General of the United States,
M. C. BURCH,
Spl. Asst. Atty. General of the U. S.,
CARL RASCH,
U. S. Attorney for the District of Montana,
FRED A. MAYNARD,
Special Asst. U. S. Atty. for the Dist. of Montana,
Attorneys for Appellant.

Dated, March 3rd, 1905.

(Endorsed:) Assignment of errors. Filed March 13th, 1905. F. D. Monckton, clerk.

94 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
BITTER ROOT DEVELOPMENT COMPANY, A CORPORATION; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon; and Daniel J. Hennessy, appellees.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

Dated March 11th, 1905.

(Endorsed:) Order allowing appeal. Filed March 13th, 1905. F. D. Monckton, clerk.

95 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE BITTER ROOT DEVELOPMENT COMPANY, A corporation, et al., appellees.
No. 1047.

Certificate of clerk U. S. Circuit Court of Appeals to proceedings, etc.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-six (26) pages, numbered from one (1) to twenty-six (26), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed, as the same remain of record in my office, and that the same, in connection with the preceding certified copy of the printed transcript of record upon appeal from the United States Circuit Court for the District of Montana, constitute a true copy of the printed record upon which the above-entitled case was heard in the said Circuit Court of Appeals and of all proceedings had therein and the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled case.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 28th day of March, A. D. 1905.

[SEAL.] F. D. MONCKTON, *Clerk.*

96 *Citation.*

The United States Circuit Court of Appeals, Ninth Circuit, to Bitter Root Development Company (a corporation); Anaconda Mining Company (a corporation); Anaconda Copper Company (a corporation); Anaconda Copper Mining Company (a corporation); Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon; and Daniel J. Hennessy:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the United States of America is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable William B. Gilbert, judge of the United States Circuit Court of Appeals for the Ninth Circuit, this eleventh day of March, A. D. 1905.

WM. B. GILBERT,
United States Circuit Judge.

97 Service of the within citation is hereby accepted this 21st day of March, 1905.

A. J. CAMPBELL,
Solicitor and of counsel for Margaret P. Daly and Margaret P. Daly, Executrix.
JOHN F. FORBIS and L. O. EVANS,
Solicitors and of counsel for Anaconda Copper Mng. Co., John R. Toole, W. W. Dixon, Wm. Scallon, and Daniel J. Hennessy.

98 (Indorsed:) 1047. United States Circuit Court of Appeals, Ninth Circuit. United States of America, appellant, v. The Bitter Root Development Co. et al., appellees. Citation. Filed Mar. 27, 1905. F. D. Monckton, clerk.

(Indorsement on cover:) File No. 19703. U. S. C. C. of Appeals, 9th Circuit. Term No. 223. The United States, appellant, vs. Bitter Root Development Company, Anaconda Mining Company, Anaconda Copper Company, et al. Filed April 8th, 1905. File No. 19703.

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JAMES H. MCKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

UNITED STATES OF AMERICA, appellant,
v.
BUTTE ROCK DEVELOPMENT COMPANY, a corporation; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole; William W. Dixon; William Scallon, and Daniel J. Hennessey, appellees.

No. 223

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

UNITED STATES OF AMERICA, appellant, *v.* BITTER ROOT DEVELOPMENT COMPANY, a corporation; Anaconda Mining Company, a corporation; Anaconda Copper Company, a corporation; Anaconda Copper Mining Company, a corporation; Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; John R. Toole, William W. Dixon, William Scanlon, and Daniel J. Hennessey, appellees.	No. 227.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance this cause on the docket and to assign it for hearing at as early a date as the convenience of the court will permit.

STATEMENT OF THE CASE.

The Government, in February, 1903, filed its bill in the Circuit Court of the United States for the District of Montana, alleging that the several defendants, by conspiracy, have appropriated upward of two million dollars, the proceeds of timber cut and removed from public lands, which was subsequently manufactured into lumber and sold.

That in order to conceal, but accomplish, his purpose, Marcus Daly, aided by the other defendants, under the name of the Bitter Root Development Company, at certain times during the several years of said depredations, which extended from the year 1890 to the year 1900, applied for and obtained from the proper officers of the Government permits to cut upon small portions of the tracts described in the bill; and under cover of the same not only cut and manufactured the timber growing upon the lands included in such permits but entered upon large tracts of land adjacent, cut and manufactured the timber growing thereon, sold the product to persons unknown to complainant, and appropriated and divided the proceeds in ways unknown except to themselves.

That such permits were authorized by section 8 of the act of Congress of March 3, 1891 (26 Stat., 1095, 1099), to "Repeal timber culture laws," and by prior acts.

These permits contained the conditions that all rights and privileges under them were to expire at certain dates; that no trees should be cut or removed less than 16 inches in diameter; that not more than 50 per cent of the timber growing thereon might be cut from each acre embraced within the permit; that report should be made monthly of the amount and kinds of timber taken during the month, with a description of the tracts from which cut, stating how the timber was disposed of and to whom; and that no timber cut under the permit should be cut or removed for transportation out of the State of Montana.

The bill avers that said permits were used simply as cloaks to cover the fraudulent acts of the defendants, by which an immense territory of the complainant was denuded of its valuable timber.

The prayer is that each of the defendants be decreed to hold in trust for the use and benefit of complainant so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the alleged fraudulent conversion of the timber of complainant; that complainant recover from each of the defendants the profits each received by reason of such fraudulent operations upon the said public lands described; that each of the defendants be required to discover and disclose concerning their fraudulent transactions and operations, and that an accounting be taken by the court of the same; that the defendants be required to produce all licenses, permits, and all other documents received from complainant by which they claimed to cut and remove timber from complainant's lands, and that defendants account for logs received and manufactured at their several mills and the profits which they or either of them received or made from unlawfully cutting upon lands of complainant as stated in the bill. There are other prayers for discovery and accounting and the usual prayer for general relief.

The defendants demurred to the bill. The Circuit Court sustained the demurrer and dismissed the bill, without opinion. From this decree complainant appealed to the Circuit Court of Appeals for the Ninth

Circuit, which court affirmed the decree of the lower court (133 Fed., 274). Complainant has prosecuted an appeal to this court.

The motion to advance is submitted for the reason that the question involved is as to the forum in which this claim shall be prosecuted. The Government insists that because of the manner in which the operations were carried on it can only obtain adequate relief in equity; the defendants insist that complainant must be confined to its actions at law.

It is essential, if the Government is to hope to recover the value of its timber so taken, that the question be settled at an early date. The acts were committed between 1890 and 1900, and had long been committed before the frauds were discovered. Some of the defendants are dead; the witnesses are growing old, dying, and moving out of the jurisdiction; time is changing the physical conditions of the land; and because of all these facts it is becoming more and more difficult to preserve the testimony which the Government has, or which it may by proper process obtain.

For these reasons the Government desires that the question of jurisdiction be settled at an early date.

The Government further requests that if this motion and the motion to advance the case of *United States* v. *William A. Clark* are granted, the cases be assigned for argument on the same date.

HENRY M. HOYT,
Solicitor-General.

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JAMES H. McKENNEY,
Clerk.

No. 223.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,

v.

BITTER ROOT DEVELOPMENT COMPANY, ANACONDA MINING COMPANY, ANACONDA COPPER COMPANY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
BITTER ROOT DEVELOPMENT COMPANY, Anaconda Mining Company, Anaconda Copper Company, et al. } No. 223.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT.

This is an appeal from a final decree of the Circuit Court of Appeals for the Ninth Circuit (for opinion see 133 Fed. Rep., p. 274), which affirmed a final decree entered by the Circuit Court, District of Montana, dismissing the bill.

The case was heard on general demurrers filed by Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, the Anaconda Copper Mining Company, a corporation, and John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy. No service could be had on defendant Bitter Root Development Company,

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Anaconda Mining Company, or Anaconda Copper Company, as they have no officers or offices and are not now in existence.

A fair abstract of the bill of complaint and demurrers is contained in the case reported in the Federal Reporter as above cited and in record, pages 34–38. In the interest of economy and brevity we refrain from repeating the same here

THEORY OF COMPLAINANT'S BILL.

The theory of the bill of complaint is that Marcus Daly, in his lifetime, deliberately formed the purpose of acquiring large amounts of Government timber without paying for it or acquiring the lands upon which it stood. That, to carry out this purpose, he organized the Bitter Root Development Company, owning and controlling practically all of it at all times, and then approached the officers of the Interior Department under a law which then existed, following the repeal of the Timber Culture Act, and obtained permits from said Department to cut 50 per cent of the timber on certain small tracts at different times. That using this as a cover and procuring new ones from time to time in the name of said company he cut over the entire territory described in the bill during a period of ten years, giving out that he had permits to do so and thus covering the cutting of large bodies of timber, under one scheme or another, to which he had no title. That in expectation of the possibility of ultimately being called to account for his misdeeds, he not only organized this Bitter Root Development Company, but after operating it for a

time transferred its entire property and belongings back and forth to different corporations organized for the same general purpose, all of which doings are described in the bill, under such circumstances as practically to constitute himself and said companies and transferees constructive trustees of the Government. That he was thus enabled to acquire, in the course of this series of operations, by various methods and means fairly set forth in the bill, a large body of timber valued at $1,750,000, not by mere trespass upon lands included in the permits, but by fraud, concealment, false representation, and failure to account to the proper officers of the Government as required in the permits, thus covering up his movements and shielding himself from pursuit by the appellant. That as a result of his proceedings, the companies were dissolved or ceased to be objects of pursuit by reason of having no further business or assets and the whole of their operations, their books, records, and other paraphernalia concealed. That by reason of these fraudulent doings he was enabled to swell his estate to the extent of the amount above mentioned, except, perhaps, as he paid portions to the persons conspiring with him and acting under his direction, and that the whole scheme was so carried out as to render pursuit in actions at law practically impossible because of the great multiplicity of suits that would be involved, the impossibility of reaching any assets or collecting any judgments, as well as the impossibility of obtaining, without accounting and discovery, that which belongs to the appellant.

The fundamental source of equity jurisdiction lies in the fraud which raises the constructive trust, but out of the situation naturally grows other remedial elements of jurisdiction of a court of equity, as discovery, accounting, settlement of an estate (Daly having deceased), prevention of multiplicity of suits, and the inadequacy of remedies at law.

ASSIGNMENTS OF ERROR.

The complainant, the United States of America, assigns as grounds of error the following:

I.

The court erred in sustaining the general demurrers to the bill of complaint.

II.

The court erred in not holding that the bill of complaint sets forth sufficient facts and circumstances to invoke the aid of equity.

III.

The court erred in entering a final decree dismissing complainant's bill of complaint.

IV.

The court erred in not overruling said general demurrers, and in not ordering the defendants to answer the complainant's bill of complaint.

V.

The court erred in not holding that the bill shows upon its face that the complainant has no plain, adequate, and complete remedy at law.

VI.

The court erred in not holding that the bill shows on its face that the only forum in which the complainant can have a full, adequate, and complete remedy is in a court of equity.

ARGUMENT.

Until this time defendants have contended that appellant has a complete remedy at law and this contention has been sustained by both courts below.

The rule is that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, practicable, and efficient to the ends of justice and its prompt administration as the remedy in equity. (*Boyce's Executors* v. *Grundy*, 3 Peters, 215; *Kilbourn* v. *Sunderlin*, 130 U. S., 514; *Walla Walla* v. *Walla Walla Water Company*, 172 U. S., 112.)

The application of this principle must depend on the character of the case as disclosed by the pleadings and the circumstances of each case. If the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. When equity can give relief complainant ought not to be compelled to speculate upon the chances of his obtaining relief at law. (*Watson* v. *Sutherland*, 5 Wall., 74; *Payne* v. *Hook*, 7 Wall., 425; *Davis* v. *Wakelee*, 156 U. S., 680–688; *Bank of Kentucky* v. *Stone* (C. C. A.), 88 Fed. Rep., 391.)

The mere fact of the existence of a legal remedy which may be made available is not a sufficient objection to the more convenient remedy in equity, and

in many cases the latter court assumes jurisdiction on the grounds of the greater convenience and adaptability of its peculiar machinery. (Cyc. of Law and Proceedure, vol. 1, p. 421, and the many cases there cited; *Russell* v. *Clark's exrs.*, 7 Cr., 69–89; *Wylie* v. *Coxe*, 15 Howard, 415–420; *Jones* v. *Bolles*, 9 Wall., 364–369.)

In *Root* v. *Ry. Co.* (105 U. S., 189), often relied on to support the claim that the aid of equity can not be invoked, Justice Matthews in speaking for the court is careful to say that—

> grounds for equitable relief may arise, other than by way of injunction, where equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of and inhere in the nature of the account itself springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in the legal tribunal difficult, inadequate, and incomplete; and as such cases can not be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground for exception from the general rule.

Applying the rule established by these decisions to the bill of complaint in this case, we claim that the court erred in sustaining the demurrer of defendants and in dismissing the bill, because it affirmatively appears on the face of the bill that equitable interposition is necessary on account of impediments which prevent a resort to remedies purely legal; that such impedi-

ments were created by the defendants for the express purpose of disabling the complainant from a recovery at law altogether, or at least making his remedy in the legal tribunal difficult, inadequate, and incomplete.

The court erred in sustaining the demurrer and dismissing the bill for the reason that the defendants, having fraudulently converted the complainant's property, are in equity constructive trustees, and the complainant may follow the avails of such fraud through its various transmutations.

The doctrine of constructive trust, by which one who has been defrauded of his property is treated in equity as a constructive *cestui que* trust and has the right to follow the property of which he has been defrauded into any form it may assume while in the hands of a party to the fraud, and to claim not only the trust *res* and its avails, but also any increase in value by reason of its transmutation of form, is ancient and well settled.

In *McMullen Lumber Company* v. *Strother* (136 Fed. Rep., 295 C. C. A., eighth circuit) at page 305, the court says:

> There is another ground of equitable jurisdiction presented in the bill that is unquestionable. It is alleged that the moneys wrongfully withheld by the defendants, in equity belonged to the complainant, and that the defendant in effect had surreptitiously invested the funds in real estate and personal property. This being so the complainant has the right to follow the funds into any property into which it has been converted. Equity converts the holders of the

> legal title into constructive trustees for the benefit of the equitable owner, and accords to the complainant the option either to take the trust property absolutely, or to enfore against it a lien, to the extent of the amount so converted, citing *Broom Mfg. Co.* v. *Guymon*, 115 Fed., 112, and many other cases.

In Perry on Trusts (ch. 6, sec. 166, 5th ed.), in speaking of how a constructive trust may arise, it is said:

> Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds for the owner of the legal title to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee.
>
> Therefore courts of equity, by raising a constructive trust in cases of fraud, can do equal and complete justice between the parties. By this fiction of a constructive trust courts of equity have great power.

The fact that the property was stolen from the true owner and not obtained by fraud will not affect the question. Equity clearly recognizes that the property always belongs to the true owner, and therefore its proceeds must also belong to him. This has been so held repeatedly.

> *American Sugar Refining Co.* v. *Fancher*, 145 N. Y., 552; 27 L. R. A., 757.
>
> *Newton* v. *Porter*, 5 Lansing, 416; 69 N. Y., 133.

This subject was thoroughly reviewed in New York in *Newton* v. *Porter*, 5 Lansing, 416 (and 69 N. Y., 133). At page 432 Judge Balcom, of the Supreme Court, says:

> If the plaintiff had a remedy at law to bring an action for the money stolen, clearly he would be entitled to equitable relief where the circumstances were such as to require an appeal to the equitable powers of the court. The bonds here had been converted into money, the money into securities, and these securities were held in such a manner and by such varied interests that this would be beyond the reach of any strict legal remedy and only within the comprehensive scope of a bill in equity where all the parties could be brought in and every right protected so as to adjust and determine the entire merits of the case. This remedy is manifestly appropriate and within the jurisdiction of the court in the exercise of its equitable powers.

The syllabus in 69 N. Y. *supra* reads as follows:

> The owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker or his assignee with notice; and this right continues and attaches to any securities or property in which the proceeds are invested so long as they can be traced and identified, and the rights of a bona fide purchaser do not intervene. The law will raise a trust *in invitum* out of the transaction in order that the substituted property may be subjected to the purposes of indemnity and recompense.

On page 138, Judge Andrews, for the court, says:

> In courts of equity the doctrine is well settled and is uniformly applied that when a person standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The jurisdiction exercised for the protection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made—whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fails, or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. (*Lane* v. *Dighton*, Ambler, 409; *Mansell* v. *Mansell*, 2 P. Wms., 679; *Lench* v. *Lench*, 10 Ves., 511; *Lewis* v. *Madocks*, 17 Ves., 49; Perry on Trusts, sec. 829; Story's Eq., sec. 1258.)

It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it or the property into which it had been converted, than one, who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts *in invitum* is when a party receives money which he can not conscientiously withhold from another party."

The court below said that *Newton* v. *Porter* was not in point, because the defendants therein were insolvent,

and because the bill in this case does not allege that the profits fraudulently obtained by the appellees through the tort complained of have been invested, or are now discovered in some particular form of property which might be charged with a trust *in invitum*.

The answer is that the aid of equity is not to be denied where a case is otherwise made simply because the defendant may be solvent, and simply because at the time the bill is filed the complainant may not have exact information as to the particular property sought to be charged.

In *Angle* v. *Chicago, St. Paul, &c., Railway* (151 U. S., at p. 25), this court, per Mr. Justice Brewer, says:

> Waiving the question as to the solvency of the Omaha company, and assuming that any judgment against it for damages could be fully satisfied by a legal process, there remains a proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property the possession of which it sought to secure, and did in fact secure, by its wrongful acts.

In that opinion it is also said:

> It may be conceded that an action at law would lie for the damages sustained by the Portage company through the wrongful acts of the Omaha company.
>
> Indeed that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. * * * While no express trust is affirmed as to the land; yet it is

> familiar doctrine, that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.
>
> The plaintiff is entitled to the identical securities, the title to which never passed from Williamson to the defendants.
>
> So, if the defendants have sold any of those stocks, the plaintiff is entitled to an accounting for any dividends they may have received from them, as well as their value; and these remedies can only be completely given by an action in equity, in which a reference can be had, and the precise relief to which the plaintiff is entitled given to him.

The court adopts this from Pomeroy Eq. Jur., sec. 155:

> If one party obtains the legal title to property, not only by fraud or violation of confidence or a fiduciary relation, but in any other unconscientious manner, so that he can not equitably retain the property, which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.

In *Clews* v. *Jamieson* (182 U. S., 461), at page 479, this court says:

> All possible trusts whether expressed or implied are within the jurisdiction of the chancellor * * * the fact that the relief demanded is a recovery of money only is not important

> in deciding the question as to jurisdiction of equity. The remedies which such a court may give "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts can not administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the cestui que trust, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief, to be obtained by the cestui que trust, consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein. (1 Pom. Eq. Jur., sec. 158.)

In *American Sugar Refining Company* v. *Fancher* (145 N. Y., 552) the New York Court of Appeals, by Chief Judge Andrews, reaffirms the rule announced in *Newton* v. *Porter* (*supra*). It is said therein:

> The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as

his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of bona fide purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice. * * * Even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass. * * * It often happens in cases of transfer of real estate procured by fraud that, before the action is brought or the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part or has created liens thereon in favor of the bona fide purchasers for value. In such cases the court will mold the relief to suit the circumstances and will, at the election of the plaintiff, rescind the contract and compel a reconveyance of the part of the land still remaining in the hands of the vendor and compel the wrongdoer to account for the proceeds of the land sold or award compensation in damages. The court in many cases resorts to the fiction of a trust and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff.

In *Missouri Broom Manufacturing Company* v. *Guymon* (115 Fed. Rep., 112), it was disclosed by the bill that such part of the broom corn as had not been worked up into brooms had been mingled by the broom company with other broom corn, which rendered it difficult of identification; that the property had been twice sold and that the rights of the alleged purchasers would be a subject-matter for careful investigation. It was also charged in the bill that a part of the commodity had been manufactured into brooms and consigned to third persons, who were acting in collusion with the broom company and who were chargeable, as fraudulent trustees, with the property or the proceeds thereof which they had received.

In answer to the point that an action at law by way of replevin would have furnished an adequate remedy for the wrong complained of, since the property involved was personalty, and hence that a court of equity was without jurisdiction, the court says:

> It is obvious that the complainant could not obtain complete relief by a single action in replevin such as he could obtain by the more flexible processes of a court of equity. Serious obstacles may stand in the way of obtaining adequate redress at law. Besides the fact that the fraudulent vendee, when the election to rescind is made, occupies the position of a trustee, should dispose a court of chancery to assume jurisdiction on the ground of declaring and enforcing the trust.

These decisions, we submit, established the rule on which we rely.

That the rule applies to the bill under consideration will appear from its examination. It is charged in paragraph 8, record page 11, as follows:

> Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by other parties and as aforesaid, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and under cover of such permits said conspirators not only cut, carried away, and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, then willfully and fraudulently entered upon large tracts of lands adjacent thereto and cut, carried away, drove, and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown and known only to said Marcus Daly, his said agents, and the officers of said Bitter Root Development Company, and appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom besides said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time it is impossible for your orator

to say, as all books of account of every kind and character were then and are now in their possession, under their control, or with their assigns.

A permit typical of all others issued to said Bitter Root Development Company, with the conditions imposed, reads as follows:

Permit to cut timber. United States of America. Department of the Interior. General Land Office.

Whereas, in conformity with the provisions of an act of Congress approved March 3, 1891, entitled, "An act to amend section eight of an act approved March 3, 1891, entitled 'An act to repeal timber-culture laws, and for other purposes,'" and rules and regulations promulgated by the Secretary of the Interior for the execution of said act, the Bitter Root Development Company, of Hamilton, Montana, has made application to cut and remove timber from a portion of the public lands, fully and specifically in said application described, for necessary agricultural and mining purposes, and for manufacturing lumber for domestic uses.

And whereas it is deemed necessary for the public interest that permission be granted unto the said Bitter Root Development Company to cut timber on the lands hereinafter described;

Therefore, under and by virtue of the authority vested by law in the Secretary of the Interior, and subject to all the conditions, restrictions, obligations, and limitations herein contained, permission is hereby granted unto

the said Bitter Root Development Company to cut timber on the public lands for immediate use in the State of Montana, which said timber may be cut on public lands in the county of Missoula, in said State of Montana, within limits particularly described as follows, to wit:

Being certain tracts of public lands, which, when surveyed, will be sections 19 and 30, in township 2 N. of range 20 W., sections 4, 8, 9, 17, 19 and 30 in township 1 N. of range 21 W.; sections 22, 24, 27 and 33, in township 2 N. of range 21 W.; sections 25, 26 and 34 in township 1 N. of range 22 W.; sections 4, 8, and 9 in township 1 S. of range 22 W., principal meridian.

Provided, however, it is expressly stipulated and agreed that the permit hereby granted shall be, and the same is hereby, made subject to the following conditions, restrictions, and limitations, to wit:

1. That this permit and all rights and privileges hereunder shall expire on the 31st day of January, 1896.

2. That no trees shall be cut or removed that are less than sixteen (16) inches in diameter, except such as may be absolutely necessary for making needed roadways through the timber.

3. That in the cutting of timber in the manner and for the purpose set out in the application of said Bitter Root Development Company not to exceed 50 per cent of the timber of each class now growing thereon, and taken as nearly as may be from each acre of the tracts above

described, shall be taken from the lands embraced in this permit.

4. That the said Bitter Root Development Company shall submit monthly, through the register and receiver at Missoula, Mont., a statement under oath, showing the amount of each kind or kinds of timber cut or removed during each month, giving a discription of the particular tract or tracts from which such timber was cut, and stating how much timber was disposed of and to whom.

5. That no timber cut or removed under this permit shall be so cut or removed for transportation out of the State of Montana.

6. That in acting under this permit no timber is to be cut or removed from any tract or tracts covered by the settlement or occupation of any bona fide settler intending to perfect title to such tract or tracts under any of the laws of the United States, nor for any tract or tracts embraced in any reservation of whatsoever kind created by operation of law or proclamation of the President.

7. That all of each tree cut that can be profitably utilized shall be used, and that the said Bitter Root Development Company shall cut, remove, burn, or otherwise safely dispose of the tops and brush of trees, and the tails, slabs, sawdust, and other refuse from their sawmills, with a view to preventing the same remaining food for flames, and that the said Bitter Root Development Company stand liable in damages for the starting or the spread of any fires attributable to their neglect or that of their em-

ployees, in any manner, to comply strictly with this provision.

8. That during the continuance of this permit the said Bitter Root Development Company agree not to purchase timber cut on public land of the United States of any person or persons not having a permit from this Department to cut timber from said public lands, except as provided in section 4 of the circular of May 5, 1891; and they further agree to ascertain affirmatively that persons offering timber for sale have the necessary permit to cut the same if taken from the public lands.

9. That nothing in this permit shall be construed to give to the said Bitter Root Development Company the exclusive right to cut or remove timber from the lands described herein, nor shall the granting of this permit in any way be held to withdraw the lands embraced therein from settlement or occupation and entry by any qualified bona fide claimant.

10. That the right is hereby reserved to modify or revoke at any time the permission hereby granted.

11. That the said Bitter Root Development Company shall be subject to all the rules and regulations under the said act of March 3, 1891, as well as the conditions, restrictions, and limitations herein set forth and such additional rules and regulations as may hereafter be promulgated.

12. In consideration of the granting of this permit, it is expressly stipulated and agreed that the said Bitter Root Development Com-

pany will use all available means to prevent forest fires, and should such fires be started to endeavor to extinguish the same within the limits herein described.

13. That this permit is not transferable, and any attempt to transfer the same will render it void.

(Witness:) W. M. STONE,
Commissioner of the General Land Office.
Approved, February 13, 1893.
JOHN W. NOBLE,
Secretary of the Interior.

The courts, of course, will take judicial notice of this act of Congress and said rules and regulations.

These permits were made expressly subject to the condition, No. 4 *supra*, that the company should submit monthly to the register and receiver at Missoula, Mont., a statement under oath showing amount of each kind or kinds of timber cut or removed during each month, a description of the particular tract or tracts from which said timber was cut or removed, and how much timber was disposed of and to whom. This brings it within the rule governing fiduciary relations, as it embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies on another. (See *Words and Phrases Judicially Defined*, vol. 3, p. 2761, and cases there cited.)

By reason of the duty of the Bitter Root Development Company to keep true and accurate accounts and monthly submit statements to the officers of the Government, and by reason of its failure so to

do, the proceeds of the lumber retained by it become in its hands trust funds belonging to complainant. There was a breach of this trust; its extent is peculiarly within defendant's knowledge. In such cases choice of remedy is with the party aggrieved, and he may proceed in equity for an accounting and pursue the fund.

This case is governed by the rule declared in *Northern Pacific* v. *Lewis* (162 U. S., 366), as follows:

> Where in any action by the United States against a railroad corporation for the conversion of logs cut from Government lands, the defendant admits the taking, but justifies its action in a suit permitting it to take timber for construction and repair of its railways, the burden of proving that the logs were taken and used in accordance with the suit is upon the defendant.

This rule was reaffirmed in *United States* v. *Denver & R. G. R. R. Co.* (191 U. S., 84).

> In this case it is said upon principle as well as upon authority, a party who has been shown to be prima facie guilty of the trespass, and relies upon a license, must exhibit his license and prove that his acts were justified by it. The practical injustice of a different rule is manifest. It would require the plaintiff not only to establish a negative; that is, that the timber was not cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose upon the plaintiff a difficult if not an

impossible task to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could be readily produced by the defendant. * * * It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of. (*Commonwealth* v. *Rafferty*, 133 Massachusetts, 574; *Commonwealth* v. *Towle*, 138 Massachusetts, 490.) As the license (the statute in this case) authorized the timber to be cut only for a specific purpose, and the means of proof, as to the purpose for which the timber was cut, were particularly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it.

We are authorized to invoke the aid of equity by reason of the fraud, misrepresentations, and concealments practiced by the defendants.

Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained. (Pom. Eq. Jar. 3d ed., vol. 2, sec. 873.)

The two principal elements of actual fraud are misrepresentation and concealment. At section 912, treating of the English doctrine, Pomeroy says:

> The doctrine is fully settled by an unbroken line of decisions extending to the present day, that, with one remarkable exception (Fraudulent Wills), the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate.

This court in *Jones* v. *Bolles* (9 Wall., 369), by Mr. Justice Bradley said:

> It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. The objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery.

This settled rule conferring the jurisdiction applies to the case made by the bill. The frauds, misrepresentation, and concealment of the defendants are the very gist of the case.

In paragraph 9, record, page 11, the bill charges:

> That in pursuance of said conspiracy and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and

the other parties before mentioned engaged the services of a large number of men *falsely* representing that they had authority from your orator to cut the growing timber on tracts of land, *not included in any license*, and made contracts with such men by the terms of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, *by reason of which representations* and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts and enabled them to successfully prosecute the same.

In paragraph 11:

> Your orator further shows that the said Marcus Daly and his associates, in further execution of said conspiracy, organized other corporations for the purpose of *concealing* their illegal acts and complicating and confusing the situation so as to make detection and proof of the same difficult, if not impossible.

Paragraphs 11, 12, 13, 14, 15, and 16 set forth in detail said corporations.

In paragraph 17 of the bill it is said:

> Said defendants, or some of them, have had at all times, and now have, possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them, but by reason of the frauds

> practiced by said defendants as aforesaid, and their acts performed *for the express purpose of concealing* from your orator the facts of the case, by means of the formation and the dissolving and the reforming of corporations and by reason of said defendants having possession of all books of account it is impossible for your orator to give to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just where and to whom the logs, when manufactured into lumber, were sold, or just when and by whom the proceeds thereof were obtained and when the same were divided.

We submit that these and other paragraphs of the bill make out a case within the rule and are a complete answer to the appellee's claim that the charges therein contained are general, uncertain, and indefinite.

The facts of the case were set forth as fully as we were able to do at the time the bill was drawn. Had the concealments alleged in the bill and the complications devised for the express purpose of preventing knowledge not been so great, we would have more exact knowledge of the details of this fraud and could have stated them more fully in the bill, but the objection of the appellees is not good in law, as the rule is this:

> While every material fact to which plaintiff means to offer evidence ought to be distinctly stated, a general statement of the matter is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to

prove the general charge, for these circumstances are properly matters of evidence which need not be charged in order to put them in as proofs.

Story Eq. Pl., sec. 28.
1 Dan'l Ch. Pr., p. 380.

How can counsel insist, as they do in their demurrers, that the bill does not show how the acts of the defendants were fraudulent, or how the complainant was injured, when they admit (as distinctly alleged in the bill) that $1,700,000 worth of complainant's timber was unlawfully taken by them and converted to their own use?

The court erred in sustaining the demurrer and dismissing the bill because an accounting is necessary.

When an account cannot be justly and fairly taken at law, equity has always had jurisdiction. In *Weymouth* v. *Boyer* (1 Ves. Jr., 424), Mr. Justice Buller, sitting for the chancellor (Lord Thurlow), says:

> We have the authority of Lord Hardwicke that if a case was doubtful, *or the remedy at law difficult*, he would not pronounce against the equity jurisdiction. The same principle has been laid down by Lord Bathurst.

In *Corporation of Carlisle* v. *Wilson* (13 Ves. Jr., 278) the lord chancellor (Erskine) says:

> The principles upon which courts of equity originally entertained suits for an account when a party had a legal title is that, though he might support a suit at law, a court of law either can not give a remedy or can not give so complete a remedy as a court of equity.

Mr. Chief Justice Marshall, in *Fowle* v. *Lawrason's xrs.* (5 Pet., 495, 503), says:

> In all cases in which an action for an account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted.

There can be no real doubt that the remedy in equity n cases of account is generally more complete and dequate than it is or can be at law.

> *Kilbourne* v. *Sunderland*, 130 U. S., 505–515; 1st Story Eq. Jur., secs. 450–495; Pomeroy's Eq. Jur., sec. 1421.
>
> *Kirby* v. *Lake Shore Ry.*, 120 U. S., 130, 134.
>
> A suit in equity for an accounting is proper where the accounts are all on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law.

lso,

> Where a fiduciary relation exists between the parties, and a duty rests upon the defendants to render an account.
>
> Pomeroy, Eq. Jur., 3d ed, vol. 4, sec. 1421, and the many cases there cited.

In the same section the author says:

> The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like.

Professor Tiedman, in his Equity Jurisprudence, at section, 533, says:

> While suits for an accounting are often employed as auxiliary to some general equitable action, courts assume jurisdiction on that ground alone when the legal remedy is inadequate.

In *Fenno et al.* v. *Primrose et al.* (116 Fed. Rep., 49), Judge Pulman, in an able opinion, decides that equity has jurisdiction where its aid was invoked on the sole ground of the complicated nature of the accounts, although the suit was brought by an agent against his principal.

We ask the court to examine particularly *McMullen Lumber Co.* v. *Strother* (C. C. A. 8th Circuit, 136 Fed. Rep., 295), as, in several respects, it bears upon this case. As to the account feature it decides that it is none the less an account that all the items of charge are by one person against another, provided the charges arise out of contract express or implied, or from some duty imposed by law; that equity takes jurisdiction for the adjustment of mutual accounts because of the fact of their intricacy and complications; that where such intricacy exists the mere singleness of the accounting is not controlling, especially in a case where discovery lies and relief is asked thereon, nor in a case where, from the peculiarly complicated transactions, a trial to a jury at law would fall far short of the remedial adequacy of a proceeding in equity.

Such a case as this presents an apt illustration of the reasons which have impelled the justices of the

Supreme Court, time and again, when counsel opposing a resort to the equity side of the court have appealed to the provision of the judiciary act that "suits in equity shall not be sustained in any case where a plain, adequate, and complete remedy may be had at law" (Act September 24, 1789, c. 20, sec. 16, 1 Stat., 82; U. S. Comp. St. 1901, p. 583), to say that the adequate remedy at law must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity" to exclude the equitable jurisdiction.

The solicitors for appellees, in the court below, contended that these decisions have no application to this case for the reason that there is no relation between the complainant and the defendants, or any of them, which would support an action for accounting, either at common law or in equity; that defendants are charged in the bill as joint tort feasors, and that complainant's action upon the facts is for trespass or conversion; that to maintain an action for accounting, either at law or in equity, there must be, between the parties, either a privity by contract or consent or a privity in law, such as guardianship, trusteeship, or some other fiduciary relation, but as against a defeasor or mere wrongdoer no action for accounting will lie, and that the fact that the conversion embraces a series of torts, each of which would have to be proven by separate and distinct evidence, does not alter the nature of the case.

The court below in its opinion says:

> It is contended that the bill presents several grounds for equitable relief, one of which is the jurisdiction of a court of equity in matters of accounting. This, it is true, is one of the established grounds of equitable jurisdiction in cases where it is shown that an accounting can not be fairly and adequately had in a court of law, or where there are fiduciary relations between the parties, or where the accounting is incident to recognized equitable relief sought by the bill. But there are no accounts in this case between appellant and appellees. The cause of action, as set forth in the bill, arises wholly in tort. A cause of action arising in tort can not be converted into a cause of action on an account at common law. Nor can the appellant, by resorting to equity, convert its cause of action which arises on the facts disclosed in the bill into a suit in equity for an accounting.

We insist that by so deciding the court ignored the rules of law above stated and in reliance on which the bill was drawn. It failed to recognize the fact that said permits were issued to and received by the defendants on the express condition (condition No. 4 *supra*) that they would submit monthly to the register and receiver at Missoula, Mont., a statement, under oath, showing amount of each kind or kinds of timber cut or removed during each month, a description of the particular tract or tracts from which said timber was cut or removed, and how much timber was removed and to whom.

The court failed to recognize that this duty so to account brings the defendant within the rule *supra*, governing fiduciary relations.

The court failed to recognize that by reason of this duty to account, and the frauds, misrepresentations, and concealments practiced by the defendants under cover of said permits, the proceeds of all the timber unlawfully cut are trust funds for which they must account.

In short, the court rejected the theory of the Government and adopted that of the appellees, viz., that the sole purpose of the bill is to have unliquidated damages for repeated acts of willful trespass ascertained in a court of equity. We submit that in so deciding the court erred.

The court erred in sustaining the demurrer and dismissing the bill for the reason that it shows that the complainant can invoke the aid of equity to avoid a multiplicity of suits.

The fourth ground on which we are warranted in invoking the aid of equity is the avoidance of a multiplicity of suits. The bill shows that the acts committed by the defendants were not simply fugitive and temporary trespasses for which adequate compensation could be obtained in an action at law and the machinery of the law courts found sufficient to reach all the facts in the case; but their acts consisted in a destruction of the corpus of the estate, as almost the sole value of the lands described in the complaint was the value of the timber growing and standing thereon. Acts of destructive waste continued over a

period of ten years, and under such complication of circumstances that no jury, in a law court, could possibly, with the means at hand, investigate the same so as to insure a correct result.

The bill shows that a very large number of actions at law would have to be commenced and tried before anything like the subject-matter of this litigation could be covered. The persons who actually did the cutting are not the same, and the facts and circumstances surrounding the cutting by the several contractors, under whose supervision the cutting was actually done in the interest of the defendants, as set forth in paragraph 9 of the bill, were entirely different, so that each suit would be separate and distinct, but there would be enough similarity in the facts and circumstances to prevent the jury in one case acting in the other, consequently the cases would have to be continued over the terms and the difficulties would prove so great that the prosecution would have to be abandoned.

The Government, in an action at law, could prove the amount of logs cut from a particular description, but on one or more essential points it would fail, because of the lack of proof, to connect the particular trespasses with particular defendants, whereas a chancellor, on reading the entire record and weighing said testimony in the light of all the facts of the case, would be convinced that the men who did the cutting were in the employ of the defendants.

Under these circumstances, adopting the language used by Judge Severens in delivering the opinion of

he Court of Appeals for the Sixth Circuit in *Bailey* v. *Tillinghast* (99 Fed., 801)—

> It is not necessary to rest the equitable jurisdiction over the case upon the fact that the receiver, as the representative of the creditors, is seeking to recover a trust fund, and that there is a complication of interest in the questions and matters involved, for we are clearly of the opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits, and for this latter purpose it is immaterial whether the suits to be avoided or proven are of a legal or an equitable character. The object is the same in either case, and the reason for the proceedings is the same.

In short, we have here practically the same situation as that presented in *DeForest* v. *Thompson* (40 Fed., 375). In that case Judge Jackson, in delivering the opinion of the court, in which Mr. Justice Harlan concurred, at page 378, said:

> It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants and succeeded, the judgment would not conclude the other defendants altogether; the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands, * * * may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing

in equity and bringing all of the defendants before the court in one action they can avoid a multiplicity of suits? I think they can.

The necessity for discovery as shown by the statements of the bill is sufficient to give equity jurisdiction.

In this case, as in *Tyler* v. *Savage* (143 U. S., 95), a recovery by the appellant depends largely on the information in the possession of the appellees which is sought by the bill; therefore, in this case, as in that, discovery is one of the grounds for invoking the jurisdiction of equity.

The bill in this case is filed for final relief and the discovery feature is a mere incident thereto.

That bills for discovery and relief inhered in the ancient jurisdiction of courts of chancery in England at the time of the adoption of the Federal judiciary act is beyond question. This being so, the like jurisdiction inheres in the Federal courts, unless abolished by statute, or changed or modified by some rule adopted by this court. No such statute has been passed, and so far from this court having interdicted the practice, its equity rules 40, 41, and 44 expressly recognize the existence of bills of discovery.

If, then, the bill of complaint states a cause for equitable relief, all the points raised by the defendants in their general demurrers relative to the discovery features thereof should be disregarded, for the rule is settled—

That where the bill is filed for the purpose of obtaining final relief, and where discovery is

> only incidental to that end, there can be no demurrer to the discovery only, for the reason that if the discovery be material in support of the relief, and the complainants be entitled to the relief, the defendants must answer.

The following authorities support the above propositions:

> *Ex parte Boyd*, 105 U. S., 647.
>
> *Brown* v. *McDonald*, C. C. A., 3d Cir., 133 Fed., 897; S. C., 68 L. R. A., 462.
>
> *McMullen Lumber Co.* v. *Strother*, C. C. A., 8th Cir.; 136 Fed. Rep., 301.
>
> Bates Fed. Eq. Pro., pp. 128–130.
>
> *Gas Company* v. *Indianapolis*, 90 Fed., 197.
>
> *Rider* v. *Bateman*, 93 Fed., 31.

Adams, in his Equity Jurisprudence, American edition, page 444, says:

> It is this additional ingredient, want of discovery, *caused by the defendant's fault*, which confers a jurisdiction for relief.

But it is said by the defendants in their demurrer that a discovery should not be granted, because true answers to the bill might subject them to a criminal prosecution or accusation or to a penalty of forfeiture. The answer to this objection is this: Mr. Daly is dead, and no charges are made against his executrix, Margaret P. Daly, which would subject her to criminal prosecution or accusation or to a penalty or forfeiture.

As to the defendant corporation, the Anaconda Copper Mining Company, it is settled that it is the duty of a corporation, if required to do so by the bill, to

put in a full, true, and complete answer; and to enable it to do so it must cause diligent examination to be made of all the papers, documents, records, and muniments of title in its possession before answering.

To the point that, since all the officers of a corporation are made competent witnesses by the Federal statutes, there is no longer any reason for allowing a bill for discovery against a corporation, we answer: The corporation, as such, can not be sworn and examined as a witness, and it is apparent that a discovery from these corporations is essential to attain the ends of justice. They possess facts essential to a recovery, which complainant does not possess and can not acquire except by obtaining a discovery through their answers.

The examination of their respective officers as witnesses can in no event be the exact equivalent of a discovery by the corporations themselves under their corporate seals.

> See *Bank* v. *Heilmen*, 66 Fed., 184.
> Pom. Eq. Jur., section 199.
> *Evans* v. *Lancaster*, 64 Fed., 626.
> *McClaskey* v. *Barr*, 40 Fed., 559.

In the words of Pomeroy:

> While it is true that a defendant is never compelled to disclose facts which would tend to incriminate himself, or to expose him to criminal punishment or prosecution or to pains and penalties, fines or forfeitures, * * * this restriction to the right of discovery is subject to special limitations and exceptions necessary in order to promote the ends of justice:

A defendant is always compelled to disclose his frauds and fraudulent practices when such evidence is material to the plaintiff's case, even though the frauds might be so great as to expose the defendant to a prosecution for conspiracy, unless, perhaps, the indictment were actually pending.

Where the liability to a penalty is barred by lapse of time, the defendant can not escape making a discovery. (Pom. Eq. Jur., section 202.)

The complete answer to the point raised, that some of the defendants who aided Daly are his attorneys, and therefore they are not compelled to answer under the discovery demanded, is this:

An attorney, by reason of his professional relation, can not refuse to make a discovery of the facts within his knowledge where it is unlawful for the client to ask and the solicitor to give professional advice, and therefore communications by which fraud is contrived or arranged between a lawyer and a client are wholly excluded from the privilege, and must be divulged.

Pom. Eq. Jur., section 203.

See *Peck* v. *Ashley*, 12 Met., 482.

Where a penalty of forfeiture has at one time attached to the particular act of which a discovery is sought, and the penalty or forfeiture, either by lapse of time or the death of the party, or against whom it may be enforced, or otherwise, the objection to the discovery is thereby removed and the bill is no longer demurra-

ble. Thus, for example, if the statute of limitation for a penalty or forfeiture has expired before the suit was brought, or pending the suit before the discovery is given, the defendant is bound to answer, for he is no longer within the reach of the perils against which the protection is allowed.

> Story Eq. Pl., section 598.
>
> *Corporation of Trinity House* v. *Burge*, 2 Sim., 411.
>
> *Williams* v. *Farrington*, 3 Bro. Ch. R., 38; Anon, 1, Vern., 60.

The Supreme Court of Michigan, in *Warren* v. *Holbrook* (95 Mich., p. 185), at page 189, say:

> The fact that the acts complained of impute to the defendant the commission of a criminal offense, and that, if he were compelled to render an account, evidence might be produced forming the basis of a criminal accusation, does not oust the court of jurisdiction. This is a purely civil proceeding, and the only questions are, Did Holbrook retain money belonging to his employer? And if he did, how much? He could not, of course, be compelled to discover any facts tending to criminate himself, but this does not prevent the trial of the issue made by the pleadings under the rules of evidence in civil actions. (Story Eq. Pl., sec. 525.)

Such is the law. The necessity of applying it to this case appears from inspection of the bill.

The charge is directly made that Daly, and the other defendants named in the bill, carried on the work of spoliation for a period of ten years, and that by reason

of it the Government has lost property to the value of upward of $2,000,000; that during all this period they had, and now have, posession of a sawmill at Hamilton wherein the logs were converted into lumber; they have received all the proceeds of said sales and divided the same among them, all by reason of their fraudulent acts done for the express purpose of concealing the facts of the case by means of the formation, dissolution, and re-formation of corporations and by reason of their having possession of all books of account, it is impossible to set forth to a greater extent the details of the conspiracy complained of or to show just when or by whom the particular acts of spoliation were performed or just when or how the logs when manufactured into lumber were sold or just when and by whom the proceeds were obtained and divided.

It further appears in said bill that the principal conspirator, Marcus Daly, is dead. It is also a fact that the defendant, Bitter Root Development Company, to whom the permits or licenses were issued, has gone out of existence. It now has no officers or office. The same is true with the defendant corporations, the Anaconda Mining Company and the Anaconda Copper Company.

They were organized simply for the purpose of enabling Daly and the other codefendants to obtain possession of the property of the complainant.

It is directly charged that the avails or proceeds of the property of said spoliation is now in their possession, but just how much Mrs. Daly has in her own

person, how much is in the estate of said Daly, and how much each of the other defendants has is not known to the complainant, but is known to said defendants. Under all the circumstances of this case, is it not perfectly apparent to the court that a trial of this case before a jury is utterly impracticable? If compelled to proceed at law, complainant will have no opportunity to ascertain facts in possession of the defendants until the moment of trial. If the complainant should place such of the defendants as are now living and within the jurisdiction of the court on the witness stand, it would be bound by their testimony, as it could not examine said testimony and secure testimony in rebuttal in time for use at the trial.

It is no answer to say the complainant can have the opportunity to examine the books of said defendants. The right to examine the books is one thing, but the right to examine the defendants and their books before an examiner with the assistance of expert accountants, coupled with the right to proceed with that examination from time to time and from day to day, and in the interim to verify the examination as far as it has proceeded—the right to examine the parties in the slow and deliberate way incident to the proceedings before a master in chancery, with that attention to detail and that opportunity to make calculations and comparisons that would be simply impossible in a trial before a jury—is quite another and different thing.

We submit that that which would be feasible and comparatively easy in proceedings before a master would not be possible in a jury trial.

The court erred in sustaining the demurrer and dismissing the bill, for the reason that it shows that the complainant can invoke the aid of equity in adjusting its claim against the estate of Marcus Daly.

Long before Lord Mansfield's decision, in 1776, in *Hambly* v. *Trott* (1 Cowp., 371), the rule had been announced—

> That a court of equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him if the wrongful act has resulted in a benefit capable of being measured pecuniarily, if the demand is of such a nature as can be properly entertained by the court.

In the year 1717 the Lord Chancellor, in *Bishop of Winchester* v. *Knight* (1 Peere Williams, 406), said:

> It would be a reproach to equity to say, where a man has taken my property, as my ore, or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy.

Many English cases which sustain our position are reviewed in "English Notes" to *Hambly* v. *Trott*, English Ruling Cases, vol. 2. See also—

Garth v. *Cotton*, 1 Dickens, 183.

S. C. English Reports, Full Reprint, vol. 21, p. 239.

Marquis of Lansdowne v. *Marchioness Dowager of Lansdowne*, 1 Madd., 116.

Phillipps v. *Homfray*, 24 Ch. D., 439; 52 L. J. R. Ch., 833.

Lee v. *Alston*, 1 Br. C. C., 194.

Monypenney v. *Bristow*, 2 Russ. & M., 117.

This rule has always been recognized in this country.

In *Green's administratrix* v. *Creighton et al.* (23 Howard, 90), Mr. Justice Campbell, in delivering the opinion of the court, at page 106 says:

> The questions presented for inquiry in this suit are whether the subject of this suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control over it. The court has jurisdiction of the parties. In the court of chancery executors and administrators are considered as trustees, and that court exercises original control over them in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity and obtained a decree for payment out of the personal estate without taking a general account of the testator's debts (*Attorney-General* v. *Cornthwaite*, 2 Cox, 43; Adams Equity, 257), and the existence of this jurisdiction has been acknowledged in this court and in several of the courts of chancery in the States.

At page 108 it is further said:

> The duty of the administrator arises to pay the debts when their existence is discovered, and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decree to the substantial justice of the case.

In *Kennedy* v. *Creswell* (101 U. S., 641–645), Mr. Justice Bradley, in speaking for the court, says:

> The point taken by the appellant that the court below sitting as a court of equity had no jurisdiction of the case is not well taken. The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there he will not be turned back to a court of law to establish the validity of his claim. The court, being in rightful possession of the case for a discovery and account, will proceed to a final decree upon all the merits.
>
> The allegations of the bill in this case were sufficient to give the court jurisdiction and the accounts of the executor should show that the complainant had reasonable cause for making these allegations. They went into the court for a discovery of the assets, and the object of the bill was attained by the admission of the executor that he had sufficient assets. It would be strange, indeed, if that admission could be made a ground for depriving the court of its jurisdiction. If it could, the discovery, by proof of assets concealed by the executor, would have the same effect, and the result would be that a bill in equity could be defeated by proofs showing that there were good ground for filing it.

Mr. Pomeroy, in his work on Equity Jurisprudence, vol. 1, sec. 156, says:

> One of the most important subjects to which the theory of trust has been extended is the administration of estates of deceased persons.

> The relations existing between the executors and administrators on the one hand, and the legatees, distributees, and creditors on the other hand, have so many of the features and incidents of an express, active trust that it has been completely embraced within the equitable jurisdiction in England and also in United States.

And then he goes on to say, what is obviously true, namely, that at the common law, although individual creditors might recover judgments at law for the amount of their respective claims, the legal procedure furnished absolutely no means by which the rights and claims of all of the parties in interest could be ascertained and ratably adjusted, the assets proportionably distributed, and the estate finally settled, thus making a resort to a court of equity necessary for a proper administration of the assets.

In *Beverly* v. *Rhodes* (86 Va., 416), it is said:

> The first and principal question arises upon the demurrer to the bill. The appellant insists that the complainant's remedy was at law and that a court of equity has no jurisdiction of the case, but we do not concur in this view. That a single creditor at large of a deceased debtor may sue the personal representative in equity for an account of assets and the payment of his debt is well settled.
>
> The decree for account, however, whether the suit be brought for the plaintiff singly or on behalf of himself and other creditors (for it makes no difference), is for the benefit of all the creditors, and hence all may come in and prove

> their debt before the master and have satisfaction of their demands, equally with the plaintiff in the estate, for all are as parties. In this way a multiplicity of suits is avoided; the assets are marshaled and complete relief afforded. The jurisdiction of a court of equity in such cases is said by some of the authorities to be founded upon the necessity of taking accounts, of compelling a discovery of assets, and because there is no adequate remedy at law. By others it is put upon the ground of a trust in the personal representative which it is the duty of the court of equity to enforce, but whatever may be the reason the jurisdiction is not only well established, but with us it is practically exclusive.

The proper procedure has been declared by this court in *Byers* v. *McAuley* (149 U. S., 608), viz:

> A creditor who is not a citizen of the State of the decedent and his representative can proceed in the United States court against such representative to establish his claim therein by judgment or decree against the representative, and only limits the right by holding that, where the estate of the decedent is being administered in a probate court, the Federal court, after adjudging the validity and amount of the claim, must remit the complainant to the court having possession of the res for distribution.

Martin v. *Fort*, C. C. A., 83 Fed., 19–22.
Wickham v. *Hull*, 60 Fed., 329.
Hale v. *Tyler*, 115 Fed., 838.
Walker v. *Brown*, 165 U. S., p. 655.

These authorities, we contend, conclusively answer the objection of the court below. They establish our claim that Margaret P. Daly, as executrix, is a trustee for the complainants. The court says, in its opinion, "no discovery of the assets of the estate in her hands is required." The prayers of the bill are made for that express purpose.

In conclusion, we submit that the bill shows that the Government has the right to prosecute this suit on the equity side of the court and that the decree of the court below in dismissing the bill was erroneous and that the appellees should answer.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.
FRED A. MAYNARD,
Special Assistant United States Attorney.

HENRY M. HOYT,
Solicitor-General.

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Office Supreme Court U. S.
FILED
JAN 15 1906
JAMES H. McKENNEY,
Clerk.

No. 223.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,

v.

THE BITTER ROOT DEVELOPMENT COMPANY ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
BITTER ROOT DEVELOPMENT COMPANY and others, appellees. } No. 223.

REPLY BRIEF FOR APPELLANT.

Counsel for appellees, in their supplemental brief, urge that the permits are not sufficiently described in the bill, nor the acts which were done under them set forth in detail.

In reply, appellant insists that this is merely matter of evidence, and that the subject-matter is sufficiently referred to in the bill to admit such evidence. Counsel for appellees did not demur because such allegations were insufficient. Their original brief shows they had definite knowledge as to said permits. On page 8, supplemental brief, they say:

> But, conceding that all of appellant's contentions as to these permits are correct, that they were issued, that their contents are before the court, and still, as we submit we have plainly shown in our original brief, no necessity would exist for taking the controversy into a court of equity, as the Government has the clear legal

> right to disregard the permits, charge the defendants as willful tresspassers upon the ground covered by the permits as well as that outside, and require the defendants to come into court and assume the entire burden of proving the issuance of these permits and their compliance with each and every valid condition therein.

But appellant will *not* disregard the permits. From the beginning we have persistently urged them, but the court below ignored them and treated appellees as willful trespassers and liable not in equity but at law for unliquidated damages.

Appellant has always conceded that equity can not be invoked if the bill simply presents a case to recover unliquidated damages, nor if it clearly appears from the bill that a full, complete, and adequate remedy can be had at law. The gist of this case is the question as to whether, under the circumstances, appellant has an adequate remedy at law. The fact that there is a legal remedy is not the criterion. The legal remedy, both in respect to its final relief and its modes of obtaining the relief, *must be as efficient* as the remedy in equity or else the concurrent jurisdiction attaches. We base our right in equity on the principle recognized by this court in *Oelrichs* v. *Spain*, 15 Wall., 228, wherein it is said:

> The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is an element of trust in the case which, wherever it exists, always confers jurisdiction in equity.

Appellant claims that this case also comes under the rule in *Tyler* v. *Savage*, 143 U. S., 79. That was a case where the bill set out a case of fraud practised upon the plaintiff. Held, that there were in the case, as ingredients to support the jurisdiction of equity, discovery, account, fraud, misrepresentation, and concealment. Appellant claims all of these in this case and also trust *ex malificio* and prevention of multiplicity of suits.

Appellant also relies on the rule stated by Pomeroy in his third edition Eq. Jur., at section 181, as follows:

> If the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, *or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it*, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.

It is objected that we are not entitled to discovery because answer under oath is waived and no interrogatories are propounded, and appellees cite *Huntington* v. *Saunders*, 128 U. S., 78. Our answer is that given in the case of *Maulay* v. *Mickle*, 55 N. J. Eq., 567, which in substance is this: That the language of this court, in that case, must be read in the light of the fact that the bill did not state a cause for equitable relief.

> The waiver by plaintiff in his bill, under equity rule 41, of an answer on oath is not a

waiver of his right to a full answer and full discovery from the defendant. The only change made in the practice of the High Court of Chancery of England by the provision of our equity rule allowing a waiver of an answer on oath is to deprive the answer of any force as evidence in favor of the defendant.

In order to compel discovery from the defendant it is not necessary that the bill should contain specific interrogatories; if the bill contain a general requirement that the defendant shall answer its allegations and charges with their attendant circumstances, that will be sufficient.

Bates Fed. Eq. Proc., Vol. I, pp. 128–132, and cases there cited.

Appellant admits that at the time it drew its bill it did not have in its possession many of the facts and circumstances which it now has, and therefore the bill as originally drawn is not as full and complete as it could now be made. If the court sustains the bill, an amended bill will be filed. If the court decides that the lower courts were right in decreeing that the bill should be dismissed, we then ask that, in accordance with the rule in such cases, the bill be dismissed without prejudice to the filing of a new bill.

MARSDEN C. BURCH,
Special Assistant to Attorney-General.

FRED A. MAYNARD,
Special Assistant United States Attorney.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court U. S.
FILED
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SUPREME COURT OF THE UNITED STATES

No. 223

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

BITTER ROOT DEVELOPMENT COMPANY (A CORPORATION), ANACONDA MINING COMPANY (A CORPORATION), ANACONDA COPPER COMPANY (A CORPORATION), ANACONDA COPPER MINING COMPANY (A CORPORATION), MARGARET P. DALY, MARGARET P. DALY AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF MARCUS DALY, DECEASED, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, AND DANIEL J. HENNESSY, APPELLEES.

IN EQUITY.

BRIEF AND ARGUMENT FOR ANACONDA COPPER MINING COMPANY, a Corporation, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON, DANIEL J. HENNESSY, MARGARET P. DALY, and MARGARET P. DALY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF MARCUS DALY, DECEASED, APPELLEES.

A. J. CAMPBELL,
L. O. EVANS,
Of Butte, Montana, Solicitors and of Counsel for Appellees.

A. J. SHORES,
C. F. KELLEY and
JOHN F. FORBIS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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STATEMENT.

This is an appeal from the decision and decree of the Circuit Court of Appeals for the Ninth Circuit, affirming the decree and decision of the Circuit Court of the United States, Ninth Circuit, for the District of Montana, sustaining the demurrers of the above named appellees to the complainant's bill of complaint and dismissing the cause.

The facts stated in the bill of complaint in this case are substantially as follows:

It is alleged that on April 1, 1888, the appellant owned certain public lands in the State of Montana, which are described in the bill, comprising many thousands of acres, some of which were surveyed, and others of which were unsurveyed; that on said date there were growing and standing on said lands forests of pine and fir and other trees fit to manufacture into lumber, which standing timber was of the value of more than $2,000,000; that at the date of filing the bill said lands had for the most part been stripped of such timber, and except very small portions thereof were denuded of timber, without license or authority or permission of the United States or any one authorized to represent the appellant, and that in consequence of such spoliation the appellant has lost millions of dollars' worth of its property; that one Marcus Daly, now deceased, a citizen and resident of the State of Montana, did, on or about January 1st, 1889, determine to convert and appropriate to his own use all the merchantable and marketable timber growing and standing on the said lands without buying the same or obtaining any right or authority except as in the bill hereinafter stated; that in order to carry out his de-

signs, and to conceal his identity and to escape personal liability, and to deceive the public and the officers of the appellant, he, with the aid of certain named persons, on or about August 12th, 1890 organized, under the laws of the State of Montana, the Bitter Root Development Company of which John R. Toole, William Toole and James W. Hamilton were named as incorporators, and they, and Daniel J. Hennessy and William W. Dixon, were named as Trustees to manage the affairs of the Company for the first three months of its existence; that the capital stock of the corporation was fixed at the sum of $300,000; that said incorporators and trustees had but a nominal interest in the corporation, but certain of them were agents, and others attorneys, of said Marcus Daly and with him they conspired to denude said lands of their timber; that all of the stock of said corporation was subscribed for the use of and controlled by the said Marcus Daly, and that said named persons, together with Moses Kirkpatrick, William Scallon, Malcolm B. Brownlee, Michael Donohue, William L. Hoge, and Joseph V. Long, aided and assisted said Marcus Daly up to the time of his death in the work of spoliation which in pursuance of said conspiracy, had been planned; that said parties other than Daly participated in the profits, but to what extent it is unknown to the appellant; that such of the parties as are not made defendants to the bill are either dead, or out of the jurisdiction of the Court, or have no estate; that immediately upon the organization of the corporation, and under the corporate name thereof, said parties so named commenced the work of cutting and carrying away from said land, the growing and standing timber thereon, using at first several portable saw-mills, and later a large lumber saw-mill at the town of Hamilton, and carried

on said work with unremitting industry for several years; that at all such times the officers, directors, trustees and stockholders of said corporation acted for and in behalf of said Marcus Daly, as his agent, and had knowledge that said timber was being cut without right or authority from the public domain, *except as to a small fraction thereof as hereinafter* stated; that in pursuance of such fraudulent conspiracy, and concealment of same, the said conspirators, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations, obtain from the appellant licenses to cut certain timber on small portions of the tracts in the bill described, and under cover of such permits they carried away and manufactured not only the timber growing on the land, included in such licenses, but they wilfully and fraudulently entered upon large tracts of land adjacent thereto and cut and carried away the timber growing thereon, and afterwards cut and sold the timber to persons unknown to the appellant, but known only to said Daly and the officers and agents of said corporation; that they appropriated the proceeds of the same to their own use; that just when such sales were made, how much the proceeds were, to whom paid, in what proportion, and at what particular times the appellant is unable to say; that in further execution of said conspiracy, the said Daly and his associates, organized other corporations for the purpose of concealing their illegal acts and to make detection and proof of the same difficult, if not impossible; that on January 14, 1891, they organized a corporation known as the Anaconda Mining Company, with a capital stock of $12,500,000, divided into 500,000 shares; that on December 5 1891 the capital stock of said corporation was increased to $25,000,000; that at

the stockholders' meeting at which this was done, it appeared that no one of the incorporators or trustees that were named at the time of the incorporation had any substantial interest therein, and that on December 31, of that year, another meeting of the stockholders was held, at which it was voted to extend the term of existence of said corporation for forty years. At that meeting it appeared that Marcus Daly, either in his own person, or as trustee or by proxy, controlled over 700,000 of the million shares of the said capital stock, and in less than six months thereafter said capital stock was reduced from $25,000,000 to $1,000,000, and the number of shares from 1,000,000 to 40,000; that in furtherance of said conspiracy the said Daly, on April 27th, 1894, through his agents procured to be conveyed unto himself all the property of said Bitter Root Development Company; that in the deed of transfer it appeared that said Company, for and in consideration of one dollar, transferred all its property of every kind and description, real and personal, timber lands, timber cutting privileges and rights, etc., in fact everything belonging to the Bitter Root Development Company to Marcus Daly; that four days later Daly deeded the same property to the Anaconda Mining Company, for the express consideration of $1,442, 379.46; that said Daly did in fact receive said named consideration, the whole thereof being the result of the spoliation of the lands of the appellant as aforesaid; that the money so received by him belonged in fact to the appellant, but that in fact said consideration was not all paid in cash, but a portion of the same was in stock in said Anaconda Mining Company; but how much was cash and how much was stock the appellant is unable to state; that in furtherance of said conspiracy, on June 6th, 1895, the defendants, Kirkpatrick, Scallon

and Bromley, acting for and in behalf of said Daly, organized under the laws of the State of Montana, the Anaconda Copper Company, with an organized capital stock of $30,000,000, consisting of 300,000 shares, and for the first three months of its existence the said Kirkpatrick Scallon, Bromley, Donohue, Hoag, Hennessy and Long were named as trustees; that nine days thereafter the same persons organized under the laws of State the Anaconda Copper Mining Company, with an organized capital stock of $30,000,000, consisting of 1,200,000 shares with the same set of trustees to manage its affairs for the first three months of its existence; that in the execution of said conspiracy and for the purpose of complicating the situation, said Daly, through his agents, within one year and twenty-nine days, after having transferred his property to the Anaconda Mining Company, conveyed the identical property named in the deed to that corporation to the said Anaconda Copper Mining Company, for and in consideration of the sum of one dollar; that these several conveyances were made in the main in furtherance of said conspiracy, and for the purpose of so complicating the situation as to make detection difficult if not impossible; that the conveyance by the Bitter Root Development Company to Daly of all its property for the consideration of one dollar was fraudulent, and that the said Daly did in the name of the Anaconda Copper Mining Company carry on the same work of spoliation of the timber on said lands from the time of the conveyance of said property to said last named corporation, until the date of his death; that he continued to use the same means and the same mill, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same; that all of the

rporate assets of every kind and character of the
tter Root Development Company, either appeared
the stock of the other corporations, or was appro-
iated by Daly and his assistants to their own use
d benefit; but how much was carried over into the
d corporations, and how much was divided previous
the last deed, so referred to, and how much of the
operty of the appellant was converted by said last
med corporation, and how much thereof was appro-
iated by said company, and how much by Daly and
associates, it is impossible for the appellant to
te; that by reason of such spoliation carried on dur-
a period of about ten years, the appellant has lost
operty of the value of $2,000,000 and upwards, and
at the said Marcus Daly, and the other defendants
med in the bill, occasioned this loss by wilfully tres-
ssing on the lands of the appellant, without its con-
nt and in violation of the law, and that they appro-
iated and converted to their own use the trees and
mber growing thereon; that said defendants or some
them, have at all times had, and now have, pos-
ssion of the said saw-mill, and they have received all
oceeds from the sale of lumber, and divided the same
iong themselves; but by reason of the frauds so prac-
ed, and their concealment, and by reason of said
fendants having possession of all books of account,
is impossible for the appellant to set forth to a
eater extent the details of the conspiracy, or to show
en and by whom the particular acts of spoliation
re performed, or when and to whom the lumber was
d, or when and by whom the proceeds thereof were
eived; that owing to the sparsely settled condition
such lands, and the imperfect means of the appell-
t to patrol and protect the same, said frauds and
espasses were not discovered until a comparatively
ort time before the filing of the bill.

The bill contains this averment: "Your orator further shows that it has commenced several actions at law, in this Honorable Court, to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this Court, but that by reason of the frauds and conspiracies above set forth, and the complications which have resulted therefrom, no plain, adequate and complete remedy can be given said orator by said actions at law, and your orator is only relievable in a court of equity where matters of this kind are properly cognizable and relievable."

The bill further alleges that Marcus Daly died on the 12th day of November, 1900, and left estate of the value of about $12,000,000, in Montana and elsewhere; that a large portion of said estate was the result and proceeds of said illegal acts; that he died testate having named the defendant, Margaret P. Daly, his executrix; that his will was duly admitted to probate in the District Court of the County of Deer Lodge, in Montana, and letters of administration were duly issued thereon to the said Margaret P. Daly, and that she is now the acting executrix; that said Margaret P. Daly, under and by virtue of the terms of said last will, is now the owner of a large portion of said estate.

The bill then prays for equitable relief: First, that Margaret P. Daly ,both in her own person and as executrix, and each of the appellees, be decreed to hold in trust for the use and benefit of the appellant, so much of their estate, both real and personal, as shall have come to them directly from the proceeds of the sale of said timber; second, that the appellant recover from said appellees the profits and gains and advantages which they have received or made by reason of

said wilful trespasses and fraudulent conversion of said timber; third, that each of said appellees make a full and true discovery and disclosure of and concerning the transactions aforesad, and that an accounting be taken of all said dealings between the appellant and the appellees. That on said accounting the appellees be required to produce all licenses, permits, and all other documents of every kind and character which they may have received from the appellant, or by which they claim the right to enter upon any of said lands or to cut timber therefrom; fourth, that they account for the number of logs received by them and manufactured into lumber at their said saw-mill, or at any other mill owned or used by them; also the gains, profits, and advantages which have accrued to them from trespassing on said lands and converting said timber to their own use; fifth, that they account for all sums received on sales of such timber; sixth, that they set forth a list and description of all books of account, deeds, stock books, letters, papers, or writings relating to the matters aforesaid, or any of them, and that they deposit the same with the clerk of the court for the purpose of inspection by the appellant and for all other legitimate and usual purposes; that upon such accounting the appellees be required to pay to the appellant all money derived by them from their participation in the conspiracy aforesaid, with interest thereon, and for such further relief as pertains to equity.

There is no allegation in the bill of the insolvency of any of the defendants, or of their inability to fully respond to any judgment which might be obtained upon the facts set forth in the bill of complaint.

The bill waived any answer under oath (Trans. pp. 15, 16), and contained no special or other interrogatories.

To this bill separate demurrers were filed and presented in the Circuit Court, one by the Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon and Daniel J. Hennessy, and another by Margaret P. Daly, and Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased. The two demurrers are practically identical, and are based upon want of equity in the bill, and upon the ground that the complainant therein, had a full, complete and adequate remedy at law for the recovery of damages for the alleged wrongs, and also a full, complete and adequate remedy at law for any discovery necessary in aid of an action at law, and that the bill does not show that a discovery is sought in this action in aid of any action at law brought against these defendants, and upon other general grounds stated in the said demurrers, and also upon the ground that the said bill is uncertain and indefinite in regard to the charges of fraud and conspiracy, and in various other respects as stated in the said demurrers. The circuit court sustained the said demurrers, and entered a decree dismissing the action, after appellant had elected to stand upon its bill and waived its right to amend, and upon appeal this action of the Circuit Court was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

We have not received appellant's brief in this Court upon this appeal, but in appellant's brief in the lower Court it was stated that the Bitter Root Development Company, Anaconda Mining Company, and Anaconda Copper Mining Company, which had been served, and did not appear in the action, have no offices or officers, and are not now in existence. This statement is an error in fact and upon the record in this case. The Anaconda Copper Mining Company appeared in the

action and filed its demurrer as above stated. The other defendants, than those who appeared and filed demurrers as above stated, were not served in the action and have not appeared therein. But there is no allegation in the bill or showing in the record that would justify a statement or conclusion that any of these corporations have no offices or officers or have been dissolved.

ARGUMENT.

We submit that even a cursory examination of the bill of complaint in this case will convince this Honorable Court that the complainant has no standing in equity, but has a full, complete and adequate remedy at law for the alleged wrongs set forth in the bill of complaint; and that the demurrers of appellees were well founded and were properly sustained by the lower court. We will briefly discuss the questions raised by said demurrers in the order in which they are discussed in the brief of appellant, filed in the lower court.

THE COMPLAINANT HAS A FULL, COMPLETE AND ADEQUATE REMEDY AT LAW IN AN ACTION FOR DAMAGES.

There are a great many general statements and allegations in the bill of complaint wherein charges of fraud and conspiracy are made; and it is repeatedly stated in terms that the complainant has no plain, adequate and complete remedy at law, and that the redress which could be afforded by a court of equity would be more efficient; but, stripping the bill of complaint of these general statements and allegations ,and

looking at the facts pleaded, it will readily be seen that complainant's action is one at law for trespass and conversion; and that the only difficulty, if any, which would confront the complainant in an immediate trial of the action before a jury, would be the obtaining of exact and detailed evidence of the alleged trespasses by defendants. The gist of the bill of complaint is simply that complainant is the owner of a large quantity of land which is, in the main, described by sections and quarter sections, in the District of Montana; and that the defendants have wrongfully and without right entered upon these lands and despoiled them of the valuable timber growing thereon. Complainant's remedy for these wrongs is plainly in an action for trespass and conversion. It is purely and simply a legal cause of action, in which the right involved is a legal one, and which the defendants are entitled to have tried by a jury. The fact that a *large* number of sections of land is involved, and that the trespasses have extended over a period of years, would in nowise change the nature of the action. The only difference between this and an action in which one quarter section of land is involved, and where but one trespass upon that quarter section had been committed, is that in this case more proof would have to be offered. If complainant has proof sufficient, there could be no difficulty in presenting it and having the redress granted in a court of law and before a jury. If complainant has not the proof (and that is the only obstacle in the way of an immediate trial, as appears upon the face of this bill) it can obtain this proof more readily through an action at law than through one in equity. The parties in an action at law would be the same—no more and no less than are joined in this action—in equity, although it is not clear from the bill how the defend-

ant Margaret P. Daly, individually, can be made a party to any action at law or in equity under the facts stated in this bill.

Appellant had a clear remedy under the facts stated in the bill of complaint in an action of trespass and conversion to recover damages based upon the value of the standing timber when taken, or if the trespasses were wilfully, knowingly and wrongfully committed, as is alleged in this bill of complaint, by an action in the nature of trover to recover of the defendants the full value of the timber after it had been manufactured into lumber.

Bolles Wooden Ware Co. v. United States, 106 U. S. 432, 27 L. Ed. 230.

It is admitted upon the face of this bill of complaint that appellant has a remedy at law to recover for these trespasses, or the value of the timber, but complainant denies in terms that such remedy is as plain, speedy or adequate as its remedy afforded in equity, but it is not shown in the bill how or why the remedy in equity would be more effective. From the bill, and as claimed by appellant's counsel in the lower court, the inadequacy of the legal remedy consists only of the trouble and difficulty of unraveling and bringing forth before a jury the methods adopted by the appellees in creating corporations, transferring their property from one to the other, and in various other ways seeking to cover up their tracks; and that these devices could only be brought to light through an inspection of the books and records of the corporations, the contention of appellant being that it would not be so difficult to obtain and produce such complicated evidence in a suit in equity, that is, that the practice of taking testimony

before a master would make the task of going through this mass of evidence much easier than before a jury; but the fact that the ordinary practice and procedure had in courts of law, and which would be available to appellant, is not as convenient in the view of counsel as that had before a master or in a court of equity, cannot be asserted as a ground, permitting a resort to equity and thus depriving the defendants of their constitutional rights to a trial at law before a jury.

It is not a case where it it necessary to bring in a large number of defendants in order to protect and adjust their rights among themselves as well as complainant's rights as to each of them. Under the allegations of this bill the defendants have no claims or rights to be adjusted as between themselves. Under the bill they were wrongful trespassers, each and all of them, and each directly responsible for the injuries sustained by complainant.

The doctrine is so well settled in England by the course and practice of the chancery court, and in this country by such course and practice, and also in the Federal Courts by direct inhibition by Act of Congress, that parties cannot be deprived of their right of trial by jury where there is an adequate and complete remedy at law; and that where the relief claimed can be obtained through an action at law, courts of equity will refuse to interfere, that we will consume but little of the time of the court in discussing the proposition. The reports of the cases decided by the Supreme Court of the United States teem with decisions of that court in cases of conversion, trespass, actions for damages for fraud and conspiracy and, in fact, cases of every conceivable kind, both in tort and on contract, holding that whenever a complete remedy can be obtained at law, and whenever a legal right is the basis of the main

cause of action a court of equity has no jurisdiction, but we will content ourselves with referring the court to a few of the decisions.

See:

Pomeroy on Equity Jurisprudence (2nd Ed) Vol. 1, Section 178;
Foster's Federal Practice, Sec. 12;
Bate's Federal Equity Practice, Sec. 188;
Buzard vs. Houston, 119 U. S., 347;
Insurance Company vs. Bailey. 13 Wall., 616;
Dowell vs. Mitchell, 105 U. S., 430;
Parkersburg vs. Brown, 106 U. S., 500;
Amber vs. Choteau, 107 U. S., 586;
Litchfield vs. Ballou, 114 U. S., 190;
Root vs. Michigan L. S. R. Co., 105 U. S., 189;
Thompson vs. Allen County, 115 U. S. , 550;
Texas Pac. Ry Co. vs. Marshall, 136 U. S., 393;
Hipp vs. Babin, 19 How., 278, 15 L. Ed., 633.
Dumont vs. Fry, 12 Fed., 21;
White vs. Boyce, 21 Fed., 228;
Alger vs. Anderson, 92 Fed., 696.

In Buzard vs. Houston, supra, the Supreme Court, in part says:

> "In the Judiciary Act of 1879, by which the First Congress established the judicial courts of the United States, and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.'
>
> "The effect of the provision of the Judiciary Act as often stated by this court is that 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plain-

tiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Hipp vs. Babin, 19 How., 271, 278; Ins. Co. vs. Bailey, 13 Wall., 616, 621; Grand Chute vs. Winnegar, 15 Wall., 373, 375; Lewis vs. Cocks, 23 Wall., 466 470; Root vs. Railway Co., 105 U. S., 189, 212; Killian vs. Ebbinghaus, 110 U. S., 568, 573. In a very recent case, the court said: 'This enactment certainly means something, and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule and to impress it upon the attention of the court.' N. Y. Guarantee Co. vs. Memphis Water Co., 107 U. S., 208, 215.

"Accordingly, a suit in equity, to enforce a legal right, can be brought only when the court can give more complete and effectual relief, in kind or in degree on the equity side than on the common law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in Watson vs. Southerland, 5 Wall., 74; or where an agreement procured by fraud is of a continuing nature; and its rescission will prevent a multiplicity of suits, as in Boyce vs. Grundy, 3 Pet., 210, 215; and in Jones vs. Bolles, 9 Wall., 364, 369.

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. Parkersburg vs. Brown, 106 U. S., 487, 500; Ambler vs. Choteau, 107 U. S., 586; Litchfield vs. Ballou, 114 U. S. 193."

In Insurance Company vs. Bailey, supra, the doctrine is briefly stated, as follows:

"Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States where plain, adequate and complete remedy may be had at law, and the same rule is applicable where the suit is prosecuted in the chancery court of this district. Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court without hesitation came to the conclusion that he could not, if his remedy at law was as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

"Most of the leading authorities were carefully examined on the occasion, and the court came to the following conclusion, which appears to be correct: 'That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury.' (Citing) Foley vs. Hill, 1 Phillipp, 399; S. S. 2 House of Lords Cases, 28; Fire Insurance Co. vs. Delavan, 8 Paige Chancery, 422; Alexander vs. Muirhead, 2 Dessausure, 162; 5 American Law Reg., 546."

In complainant's bill it is repeatedly stated that the remedy at law will not be adequate, and that for some reason that does not appear from the bill it could not there obtain as complete redress as could be afforded by a court of equity. Upon the same proofs which must be presented to a court of equity, a judgment could be obtained in a court of law. A decree in equity would not more readily than the judgment in the ac-

tion at law furnish the complainant a means of collecting a sum sufficient to compensate it for the injury done to its premises. We cannot conceive of a plainer case of legal right, or one where complainant's procedure at law would be simpler.

COMPLAINANT, PRESENTING ONLY AN UNLIQUIDATED CLAIM FOR DAMAGES, HAS NO STANDING IN A COURT OF EQUITY.

Before a party can come into a court of equity and seek relief he must reduce his claim, whether it be for unliquidated damages or upon contract, to judgment. In other words, his right to a recovery at all, whether it be in damages, for tort or a recovery upon contract, is a legal right, and one triable by jury. And this right must be determined, and a judgment entered before he can seek the interposition of equity.

See:

Swan Land and Cattle Co. vs. Frank, 148 U. S., 603;
Cates vs. Allen, 149 U. S., 451;
Scott vs. Neeley, 140 U. S., 106.

THE BILL CANNOT BE SUSTAINED ON THE GROUND THAT IT IS BROUGHT TO ESTABLISH A TRUST.

Upon the oral argument before the Court of Appeals, there was argued, and authority cited in support of, an additional ground for asking a reversal of the action of the lower court—that is, that the action is maintainable in equity for the purpose of declaring a trust in property possessed by defendants. But we submit

that the contention of counsel for appellant in this connection affords no ground whatever for equitable interposition in this cause.

In the first place under the allegations of this bill, the remedy of complainant is confined to damages for the trespasses, or if wilfully wrongful, to damages in an amount equal to the actual value of the manufactured lumber or other product in an action of trover. This rule of recovery in a case of trespass and conversion upon real property, or of trover, whether the conversion be of ores or of timber, or other portions of the freehold, is settled by the uniform decisions of all courts. It has never been held that the basis of recovery is the amount of gain or profit derived by the wrong-doer from the proceeds of the sale of the manufactured article, or of the converted property, in whatever form it may have been. No court has held, so far as we have been able to find, that the basis of recovery is the value of the property into which the wrong-doer may have invested the proceeds of his act of trespass or conversion. Under the decisions, if appellant under the facts stated in this bill, should recover the full value of the timber, when fully completed and manufactured into lumber, if the trespass was wilful; or if not wilful, the value of the timber in the trees; then the appellant will have recovered all that it could claim to be entitled to. To hold otherwise would be to hold that in every case of trespass, trover or conversion, that the remedy of the party complaining would lie either in law or in equity as he might elect.

In the second place, under the general rule, the application of the principle that equity will follow and declare a trust in the property for the benefit of the real owner, where money or other property has been mis-

applied, is confined to cases where the misapplication or misappropriation has been done by parties standing in some fiduciary relation to the wronged party.

Perry on Trusts, 5th ed., Vol. 1, Sec, 128, page 170, and cases cited.
Hawthorn vs. Brown, 3 Sneed (Tenn.), 462.

Counsel for appellant has cited two cases:

Newton vs. Porter, 69 New York, 163;
The American Sugar Refining Co. vs, Fancher, 145 New York, 552;

to the effect that the same principle will be applied where the trust arose through a tort. Even a cursory examination of these cases will disclose the fact that each is based upon the peculiar facts appearing therein, and they only affirm and strengthen our contention that the bill of complaint in the case at bar states no facts justifying equitable interference on the ground that complainant is entitled to follow the proceeds claimed to have been received from the conversion and sale of its timber.

In the case of Newton vs. Porter, 69 N. Y. 133, certain bonds had been stolen from plaintiff by parties who had sold them, and the proceeds had been invested in other securities. The parties who had stolen the bonds were absolutely insolvent. The plaintiff was without remedy except to follow the proceeds of the bonds into the purchased securities. The proceeds from the sale of the bonds were clearly identified and followed into the securities claimed. There was clearly no remedy at law, and the only redress which could be afforded plaintiff was to declare her to be rightfuly entitled to

the securities purchased with the proceeds of her property.

In the case of American Sugar Refining Company vs. Fancher, 145 N. Y., 552, the proceeds of a sale of personal property induced by fraud was followed by the vendor and identified specifically and beyond question in the hands of a voluntary assignee of the vendee. The vendee, the party committing the fraud, was hopelessly insolvent. There was no remedy at law or other redress that could be afforded the plaintiff than to permit him to follow his property into the hands of the assignee.

In each of the foregoing cases, as in all cases in equity, jurisdiction was maintained by the Court, solely upon the ground that there was no remedy at law, in each case the parties committing the wrong being hopelessly insolvent.

In the case of the American Sugar Refining Company vs. Fancher, supra, the Court emphasizes the fact that it would not proceed in equity, in the absence of a showing that no legal remedy was available and adequate, in the following language:

"When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, *where there is no adequate legal remedy* either on the contract of sale or for the recovery of the property in specie, or by *an action of tort* is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes or credits are *identified beyond question* in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in de-

nial of this power, which to our minds has any force, is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) *that nothing will be adjudged as proceeds except what can be specifically identified as such*, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a bona fide purchaser is found."

In the case at bar, complainant has a plain, speedy and adequate remedy at law in an action for damages against defendants. If the Daly estate profited by the tort, as is alleged in this bill, then the executrix can be joined with the others in the action for damages. Under the bill none of the defendants is alleged to be insolvent, and each of them is presumed to be fully able to respond to a proper judgment. Complainant can much more readily obtain full redress through a judgment at law for whatever damages it has sustained than in this action or any form of action in equity.

In the third place, conceding that complainant could disregard its remedy at law and appellees' right to a jury trial and proceed in equity, we submit that there is absolutely nothing in the bill of complaint which would sustain an action to declare a trust in or to follow the proceeds of complainant's property into any property of any of the appellees. There is not only an absence of the absolutely essential allegations which would identify and ascertain the property into which complainant claims the proceeds of its timber have been converted,

but in fact the allegations of the bill positively negative the possibility of any such identification or ascertainment.

In the bill, transcript, pages 11 and 14, paragraphs 16 and 17, it is stated that it is impossible to allege who appropriated the proceeds of the sales, when they were appropriated, in what way, or what became of them. The only allegation in the bill which charges that the proceeds of the trespasses went into any property now in existence is the following allegation, found on page 15 of the transcript:

"That a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator as hereinbefore charged."

This allegation refers only to the Daly estate.

Whenever the doctrine that a trust will be deemed created out of property purchased with funds obtained by fraud or funds that have been misappropriated or misapplied, the rule is laid down clearly that the first essential to the maintaining of the suit is that the lands sought to be impressed with the trust, must be clearly described and identified, and the money wrongfully used or misappropriated must be definitely traced and clearly proved to have been invested in the lands. Where the trust money has been mingled with other moneys so as to be indistinguishable and its identity lost, no trust in any specific property can arise.

This proposition is also clearly and repeatedly recognized in the New York cases above referred to, and cited by counsel for appellant.

See Pomeroy Eq. Juris., 2d edition, vol. 3, secs. 1048, 1051, 1058, 1080.

Ferris vs. Van Vechten, 73 N. Y., 113.

In Ferris vs. Van Vechten, supra, the rule is stated as follows:

"The money paid by the trustee for lands or other property or for choses in action sought to be subjected to the original trust must be identified as trust moneys, and this is clearly recognized in all the cases, and, in very many of them, this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is that when the trust fund has consisted of money and been mingled with other moneys of the trustee in one mass, undivided and indistinguishable, and the trustee has made investments generally from money in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investment."

In the case at bar, there is no claim made that it can be shown that any moneys derived from any of the alleged trespasses had been kept separate or could be identified or traced in any manner. In fact, the bill shows that the proceeds have been intermingled, and sent in every direction. In every case of trespass and conversion where the defendant has property at all, the same allegations might be made, and the action maintained in equity. All that would be necessary would be to allege just what is alleged in this cause, and that is that the defendant has property, has profited by the trespasses, and that therefore a portion of that property must have come from the proceeds of the trespass. Until complainant can present the Court with some facts as to who received the proceeds of its property, into what property or character of property the same was converted, and the other facts necessary to trace the complainant's funds or property into specific property held by defendants, surely complainant cannot contend that it is in a position to have a trust declared.

But counsel for appellant may contend that in order to carry out his theory of trusts it is necessary that he have a discovery in order to get the necessary facts. We respectfully submit, we have clearly shown by the authorities cited, that a bill for discovery alone cannot be maintained, and where, as counsel for appellant states in his brief in this case, the case is for relief and discovery, when the facts stated are insufficient to entitle the complainant to relief, the discovery must fail also.

Preston vs. Smith, 26 Fed. 885.
Venner vs. Atchison, T. & S. F. R. Co., 28 Fed. 581.
Everson vs. Equitable Life Assurance Co., 68 Fed. 258, and affirmed in 71 Fed. 570.
Cecil Nat. Bank vs. Thurber, 59 Fed. 913.
McLanahan vs. Davis, 8 How. (U. S.) 170.

In this connection, as upon other points urged in the case, the learned counsel for appellant contends that the bill should be sustained because it is apparent that the equitable remedy would be more efficient. Why it would be more efficient is not apparent from the bill. Surely, there would be no difficulty in proceding to judgment in the ordinary course of an action at law. There would be no difficulty in issuing execution and collecting that judgment. The doctrine sometimes stated in equity that a party can proceed there if the remedy is shown to be more complete and efficient than at law, does not refer to the fact that the procedure in equity generally may be clearer or more convenient, and has no reference to the convenience of parties or counsel in trying a case. It plainly means a more efficient remedy or result, and does not refer to the manner of reaching that result. If a party is enabled in the ordinary course

and procedure at common law to proceed and obtain and collect his judgment, he has no standing in equity, and the convenience or wishes of parties or counsel surely cannot be weighed against a constitutional right to trial by jury in any case like the present one, where legal rights are involved.

There is no peculiar condition presented by the facts in this case. There is no reason presented for asserting that under the facts presented by this particular case, for any reason, either general or particular, a court of equity should interpose. The same condition would arise, and does arise, in every action of trespass and conversion where a series of torts is charged. It is immaterial to the defendants whether their controversy with the Government, upon the matters presented in this bill, is determined in a court of law or equity, but to sustain the complainant's contention is simply to work an upheaval of the entire system of Federal jurisprudence, and to hold that the right to a trial by jury is but a memory.

THE BILL OF COMPLAINT SHOWS THAT THE COMPLAINANT HAS ELECTED TO PROCEED AT LAW TO RECOVER THE DAMAGES TO WHICH IT IS ENTITLED.

The bill of complaint alleges that the complainant has commenced actions at law to recover the value of the timber taken by defendants, and that said actions are still pending. It is not only apparent from the facts stated in the bill that complainant has a complete remedy at law, but the bill shows that complainant has recognized that fact, and at the time of filing this bill in equity it had brought, and then had pending, actions at

law to recover for the trespasses and conversions referred to in the bill. Even if equity had jurisdiction concurrent with law over these matters, after complainant had elected to proceed at law, it is precluded from going into equity. There is no reason shown in the bill, except the lack of evidence (and that could readily be obtained in a law action, as we will hereinafter show) why complainant does not prosecute these law actions to judgment; and certainly it could there obtain all that could be afforded it by a court of equity. But, in any event, by making its election of remedies, conceding that there was a choice between law and equity, the complainant, upon this fact appearing, is properly relegated to the actions at law.

Pomeroy's Eq. Jurisprudence (2d Ed.), Vol. 1, Sec. 179.

NO EQUITY JURISDICTION ARISES BY REASON OF THE FACT THAT MARGARET P. DALY, APPELLEE, IS SUED AS EXECUTRIX OF THE ESTATE OF MARCUS DALY, DECEASED.

As the second ground for equity jurisdiction in the lower court, we find the more than novel proposition advanced by counsel for appellant that because of the fact that courts of chancery exercise jurisdiction over executors and administrators in certain cases, and because of the fact that Margaret P. Daly in this case is sued as executrix, therefore full jurisdiction over the entire controversy was vested in the lower court.

In support of this contention counsel for appellant has cited a number of cases in which chancery courts

have exercised jurisdiction over controversies in which executors and administrators were involved. This jurisdiction arises partially from the fact that the executor or administrator is considered a trustee for the heirs, distributees and creditors. As stated in the citations relied on by appellant's counsel, and particularly in the excerpt from Pomeroy, Sec. 156, Vol. 1, Pom Eq. Jur., an executor is considered a trustee only for *legatees distributees,* and *creditors.* A court of equity has not jurisdiction of every case brought against a trustee, but only of cases which grow out of the trust relation and by and between the parties between whom the trust really exists.

In this case Margaret P. Daly, as executrix, is in no sense of the word a trustee for complainant or any other party, who presents a claim in tort for unliquidated damages.

In an action at law, brought upon a legal right, an executor or administrator has the same right of trial by jury as any other party, and the action must be prosecuted at law. In this case Margaret P. Daly is sued as executrix, as are the other defendants, for damages for trespass and conversion committed by her intestate. If complainant recover judgment in the actions at law, this judgment would then be a debt against the estate, and payable as other debts out of the funds in the hands of the executrix. To uphold the apparent contention of counsel for appellant in this regard would be simply to hold that every action, brought against an executrix or other trustee of any character, whether brought by the *cestui que trust* or by an entire stranger to the trust, as is complainant in this case, could be maintained in a court of equity; and that the courts of law are closed to executors and other trustees.

In this case there is no allegation that Mrs. Daly has concealed or misappropriated or misapplied any of the assets of the estate. The bill simply alleges, that as executrix she is now holding an estate of about twelve million dollars which was left by Marcus Daly, who was the principal party in the trespasses and conversions set forth in the bill of complaint. Even a creditor of an estate is not such a *cestui que trust* of the executrix as will enable him to maintain a bill in equity against the administrator for the establishing and payment of his claim, merely on the ground of trust relation, in the absence of charges of fraud, maladministration or non-administration, on the part of the executrix.

Walker vs. Brown, 58 Fed., 23.
And the same case, affirmed by the Circuit Court of Appeals, in the 63d Fed., 204.

Upon an examination of the authorities cited in this connection by appellant's counsel in the lower courts, without referring to them in detail, it will be seen that in every case where jurisdiction was exercised by a court of equity in a case where an administrator was a party, it was not upon the sole ground of the trust relation, but because of other conditions which conferred jurisdiction upon the court. For instance, in some cases discovery of assets; in others discovery and marshaling of assets and distribution among all of the creditors.

There is no charge of fraud against Mrs. Daly, as executrix. No discovery of assets is necessitated. She has ample funds to meet any judgment which might be recovered.

Under the judicial systems in force all the states of the United States, where probate courts are established for the purpose of administering upon estates of deceased persons and the distribution of the estates to

heirs, creditors and other persons entitled thereto, what ground or reason can there be for seeking relief against an executrix in a court of equity upon a cause of action which can be prosecuted to judgment in an action at law? When the judgment is obtained, the claim can be presented and must be paid in due course by the executrix.

In the present case it is alleged that the executrix Margaret P. Daly has in her possession assets in amount about six times the aggregate of damages claimed by the complainant. That property is in the jurisdiction of the probate court of Montana in which the executrix was appointed. The federal court could simply enter a decree for that amount against the executrix; it could not reach out and take from the probate court of Montana a dollar of the money with which to satisfy that decree. Either as a court of law or of equity the federal court could simply establish complainant's claim as a debt against the estate, and when it had done that its power would be exhausted under the facts alleged in this bill.

Byers vs. McAuley, 149 U. S., 608.

NO JURISDICTION IS SHOWN BY THE BILL OF COMPLAINT UPON THE GROUND THAT COMPLAINANT IS ENTITLED TO INVOKE THE AID OF EQUITY FOR AN ACCOUNTING.

It is also contended by appellant that the lower court had jurisdiction of this cause, and that the bill of complaint states grounds for equitable relief, because of the concurrent jurisdiction which the courts of equity exercise over matters of accounts and accounting.

In the first place, there is no relation between the complainant and the defendants, or any of them, which would support an action for accounting, either at common law or in equity. The defendants are charged in the bill as joint tort feasors. Complainant's action upon the facts alleged is for trespass and conversion or trover. To maintain an action for accounting either at law or in equity, there must be between the parties either a privity, by contract or consent, or a privity in law, such as a guardian, trustee or some other fiduciary relation. Against a defeasor or mere wrong-doer no action for accounting will lie. The fact that the controversy embraces a series of torts, each of which would have to be proven by separate and distinct evidence, would not alter the nature of the case.

Whitwell vs. Willard, 1 Met. (Mass), 216.
Stringham vs. Winnebago County, 24 Wis., 594.
Conklin vs. Busch, 8 Pa. St., 514.
Brinsmaid vs. Mayo, 9 Vermont, 30.

The cause of action attempted to be set forth in the bill of complaint in this cause arises wholly in tort, and this cause of action cannot by the election of complainant, or otherwise, be converted into a cause of action on an account at common law. See

Sandeen vs. Kansas City & St. Joe R. R. Co., 79 Mo., 278.
Albertson vs. Grier, 4 Houst (Del)., 541.
Atchison, Topeka & S. F. R. R. Co. vs. Wilkinson, 55 Kan., 83.
Western & Atlantic R. R. Co. vs. Mead & Co., 4 Snead, 107.

It is true, as stated by counsel for appellant, that among the subjects over which equity exercises concur-

rent jurisdiction with the law is that of account or accounting. But, as in any other case, where the remedy at law is compl te, equity cannot interpose. Wherever courts of equity have taken jurisdiction in matters of accounting, it has been for the reason that the accounting was mutual and intricate or, if upon one side only, great complexity or difficulty existed, that prevented a court of law or a jury from efficiently trying the same.

See:

Pomeroy's Eq. Jur. (2d Ed.), Sec. 1421.
Washburn Mfg. Co. vs. Freeman Wire Co., 41 Fed., 410.
Baker vs. Biddle, 2 Fed. Cases, 764.
Ely vs. Crane, 37 N. J. Eq., 157.
Paton vs. Clark, 156 Pa. St., 49; 29 At., 116.
Lafond vs. Lassere, 56 N. Y. S., 459.
Smith vs. Bodin, 74 N. Y., 30.
Badger vs. McNamara, 123 Mass., 117.
McCulla vs. Beadleston (R. I.), 20 Atlantic, 11.

In Washburn Mfg. Co. vs. Freeman Wire Company, 41 Fed., 410, supra, the rule is stated by Judge Thayer as follows:

> "A case does not become one of equitable cognizance merely because an accounting is prayed for or because it is proper or even necessary to take an account, as courts of law are competent to deal with suits of that character. * * * To authorize a decree for accounting, either as to profits or damages to which a complainant is entitled under the patent laws, the court must first acquire jurisdiction of the cause on some well defined equitable ground."
>
> Also see Hipp vs. Baker, 19 How., 278, 15 L. Ed., 633.

In each of the cases cited in appellant's brief in the courts below, where courts of equity have taken jurisdiction in cases of actions for accounting, it will be seen that the jurisdiction was based not upon the fact that the suit involved an accounting, but because in each case it was shown that an accounting could not be fairly and adequately had in a court of law, or that there was jurisdiction in equity, because of fiduciary relations between the parties, or some other well settled ground for equitable interposition.

In appellant's brief below, a quotation is given from the opinion in the case reported in 5 Pet., 495, to the effect,

> "That in all cases in which an action for account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted."

From an examination of the case itself it will be seen that this excerpt standing alone does not show the true meaning of the court. The decision clearly affirms the rule that it is not every transaction in which an account is to be adjusted which can be taken into a court of equity; but that some serious difficulty at law must interpose before recourse can be had to equity.

In the present case the acts complained of against the defendants were separate and distinct acts of trespass upon and conversions of complainant's property. The bill simply charges a series of torts extending over a period of years. Under no circumstances could the defendants be called upon to account to the complainant either in action at law or in equity. Complainant must present its proof and obtain its judgment for damages as for any other species of tort. But conceding that defendants could be called upon to account, what diffi-

culty would be presented in trying the case in a court of law. The proof could be presented by complainant upon a series of trespasses the same as for one. We cannot see why a jury could not intelligibly render a verdict upon proofs properly presented for trespasses amounting to two million dollars as for any less sum; for trespasses covering a period of years as for any less period, and for trespasses great in number as for one trespass. The fact that the account involved a great number of items, all on one side, would surely not present a case beyond the ability of a jury to cope with. The aggregate of the items could certainly be presented by witnesses, and nothing of difficulty left for the jury to do or determine.

In addition it is not alleged in the bill in this action that any accounting is necessary to enable the appellant to determine or prove the quantity of timber that is claimed to have been wrongfully cut from complainant's premises, or that the desired accounting would develop such proof.

But counsel for appellant seems to contend that the present case presents one of mutual accounts; and this is based upon the charge that the complainant had granted to the defendants licenses to cut timber on certain small portions of the tracts mentioned in the bill, and that instead of confining themselves to the ground covered by the licenses, the defendants entered upon other tracts adjacent thereto, and unlawfully took timber therefrom. How this presents a case of mutual account or mutual items of account we are unable to comprehend. As argued in a subsequent portion of appellant's brief, if the defendants cut any of the timber in question under the licenses or permits from the government, it is incumbent upon the defendants to set up and prove such permission, and that the cutting was done in accordance with

such permission. If, in this case, the defendants should prove that they had a right to cut upon certain of the lands described in the bill of complaint, this would simply except from complainant's right of recovery the lands covered by the licenses, and would leave the case in the same condition as if the defendants met complainant's charges and proofs by evidence that upon a portion of the lands described in the bill of complaint they had not cut timber or trespassed at all. It certainly would not be presenting any cross-items or charges against the complainant, or presenting in any manner mutual items or mutual accounts, or even credits in the ordinary sense of the term. Under the theory of complainant's counsel if the defendants should prove that the bill was entirely unfounded, and that they had not cut timber from any of the land mentioned in the bill, it would be presenting a case of mutual account.

THERE IS NO NECESSITY FOR A RESORT TO EQUITY IN ORDER TO PREVENT A MULTIPLICITY OF SUITS.

The fourth ground upon which appellant contends that the demurrers should have been overruled by the court below is that the bill shows that this action is necessary in order to avoid a multiplicity of actions at law.

In the first place, the bill alleges that actions at law have been commenced and are now pending to recover for these trespasses. From this allegation it must be presumed that the complainant has brought all the actions at law which can be brought, or which might be necessary to cover the trespasses complained of. As the complainant, before the filing of this bill, had brought all of the actions that it could bring against these de-

fendants or any of them, it is difficult to see how this action could avoid a multiplicity of actions at law so far as these defendants are concerned.

In the second place, under the allegations of this bill no more actions at law would be necessitated than in equity. These defendants are liable, if liable at all, under the allegations of this bill, as joint tort feasors, and they are so charged. It is alleged that the individual defendants conspired together and jointly committed the acts or contributed to the commission of the acts complained of. The corporations are charged in the same manner. Under the allegations they are all jointly liable for the damages claimed to have been sustained by complainant; and they could certainly be made joint defendants in an action at law. The fact that the defendants committed a portion of the trespasses through agents and employes, or through contractors or persons whom they induced to cut the timber and then purchased the same from them, or that the timber was cut and purchased from persons, or taken from persons, who were induced by defendants to believe that defendants had a right to cut the same, in nowise changes the situation. If these facts are true, the defendants are liable directly and personally for the timber cut through agents and through contractors, the same as if they had personally and individually committed the trespasses.

If it is not necessary to join these various contractors and agents and employes in a bill of equity, in order to completely dispose of the matter, then it will certainly not be necessary to join them in actions at law, or to bring separate actions at law against them. If it would be necessary to sue all of these various other individuals and persons separately or jointly in actions at law, then they are certainly indispensable parties to this or any other action in equity in order to completely dispose of the controversy.

The fact that the trespasses charged ran over a period of a good many years would necessitate but one action at law. The fact that the trespasses were committed upon numerous tracts of ground would make no difference, as the defendants could be sued in one action at law for all of the trespasses upon any or all of complainant's premises, whether on one or a thousand tracts, the same as they are attempted to be sued in this action in equity.

If it should be contended by counsel that all of the defendants could not be joined in one action at law because of the fact that their trespasses were during different periods of time and were not joint trespasses through all of the periods covered, then it is clear that all of said defendants could not be joined in one action in equity. We know of no rule which would permit the joining in an action in equity of a number of persons, who had at different times separately and not jointly trespassed, for the reason that such joinder would avoid an action against each of the defendants at law.

The cases cited by counsel for appellant in this action have no application, for the reason that this is not a case of one party having a right against a number of persons which could be determined as to all of the parties in one suit in equity, but at law would involve separate and distinct actions, and is not a case which involves a fund or property in which a great number of persons are interested; all of whom must be before the court in order to completely and effectually dispose of all contentions which might be raised as to the property or funds.

THE ALLEGATIONS IN THE BILL OF COMPLAINT AS TO THE GRANTING OF LICENSES OR PERMITS BY THE APPELLANT TO CUT UPON CERTAIN SMALL PORTIONS OF THE TRACTS OF LAND DESCRIBED, AND THE CUTTING OF TIMBER UPON OTHER LANDS UNDER COVER OF SUCH PERMITS, IN NOWISE TEND TO SHOW JURISDICTION IN EQUITY OF THIS CASE.

It is alleged in the bill of complaint that in pursuance of the alleged fraudulent conspiracy, and in order to carry out the same, and to conceal their actions, that the said Marcus Daly, aided by the other parties, under the name of the Bitter Root Development Company, at certain times during the years when said depredations were being carried on obtained from the appellant's agents licenses to cut upon certain small portions of the tracts described in the complaint, and under cover of such permits not only cut and carried away the timber growing upon the lands included in the licenses, but also wrongfully entered upon tracts of land adjacent thereto, and cut, carried away and converted the timber growing thereon, and converted the proceeds to their own use.

These allegations contain nothing which would justify a court of equity in assuming jurisdiction of this cause. And it is difficult to see what mission these allegations have in the bill. The appellant evidently does not intend to claim any damages for timber cut from the land covered by these permits or licenses. How the fact that the appellees had permits to cut upon one tract of land would aid them in any way in concealing or covering up their trespasses upon other tracts, it is difficult to see. There is no allegation or

claim that the appellant from its records could not readily ascertain upon just what tracts of land the appellees had a right to cut. If appellant's agents discovered that the appellees, or any one else, had taken timber from government land, there would have been no difficulty in such agents referring to the licenses or permits granted and ascertaining whether the cutting was entirely wrongful or was upon the tracts covered by the permits.

There is no allegation in the bill as to the character of these permits or licenses, or as to what was required of the appellees under them, but whatever their nature may have been, they certainly could not have given rise to any fiduciary relation between the parties obtaining them and the government, or any duty to account, or have given rise to any other situation which would justify the interposition of a court of equity.. Under the settled decisions of this court, and of many of the lower Federal Courts, everyone entering upon and cutting or carrying away timber from government lands is prima facie a trespasser, and the government could properly bring suit against him as such. If the defendant in that suit claimed a right to enter and take the timber under a special license and permit, such as is granted by the Secretary of the Interior, or under the general permit or license granted by the United States Statutes, in certain cases, for instance, such as that giving the right to cut from mineral lands, or for railroad purposes, etc., it would be incumbent upon the defendant to plead and prove his license or permission from the government and to justify his acts under it. Upon the facts stated upon the bill of complaint in this action, if the government should bring an action at law, or in the actions at law already brought, should set forth the same facts regarding the cutting

vision for the calling of parties as witnesses, and for the production of papers and documents, it was sometimes held that a court of equity would maintain a bill for discovery in aid of an action at law; but since the adoption of the provisions of Section 858 of the Revised Statutes of the United States, by which parties are placed upon the same plane as witnesses as any other persons, and the sections immediately subsequent to Section 858, providing for the production by witnesses of all books, papers and other documentary evidence, and of Section 724, providing for the production on notice of the books, papers, documents, etc. all necessary evidence and all information within the control of the opposing parties may easily and readily be obtained in the action at law. And since the adoption of these statutes the parties having full remedy in the law action, and there being no necessity for recourse to equity, the courts of chancery, and particularly the Federal Courts have clearly established the doctrine that a bill for discovery alone cannot be maintained.

Safford vs. Ensign Mfg. Co., 120 Fed., 480;
Brown vs. Swan, 10 Pet. (U. S.), 497.
Rindskoff vs. Platto, 29 Fed., 130;
Preston vs. Smith, 26 Fed., 885;
U. S. vs. McLaughlin, 24 Fed., 823;
Ex parte Boyd 105 U. S., 647;
Paton vs. Majors, 46 Fed., 210;
Field vs. Hastings & Bradley Co., 65 Fed., 279.
Home Ins. Co. vs. Stanchfield, 1 Dillon, 420;
Federal Case No. 6660.

In Safford vs. Ensign Mfg. Co., supra, the court, through Circuit Judge Goff, says:

"It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the Uuited States, because under Section 724, Rev. St., it is no longer generally needed. See Rindskoff vs. Platto (C. C.), 29 Fed., 130. * * * * From these cases I deduce the doctrine that in a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. To sustain it would violate the doctrine laid down by Justice Field in Scott vs. Neely, supra, and would permit, by indirection the entertaining of a bill for discovery, although the trend of authority is that a pure bill for discovery cannot be maintained in the Federal Courts, because it is no longer necessary. For these reasons, I am of opinion that the demurrer should be sustained and the bill dismissed."

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In Brown vs. Swan, supra, the Supreme Court says:

"The jurisdiction of a court of equity in this regard rests upon the inability of the courts of common law to obtain or to compel such testimony to be given. It has no other foundation, and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness to prove what is sought from the conscience of an interested party."

In case of ex parte Boyd, 105, U. S., 657, this Court says:

"Now, it is of the essence of the jurisdiction of courts of equity in bills of discovery merely, that it is in aid of the legal right; and it is a fundamental rule, prescribed for the exercise of that jurisdiction in the words of Story, Eq. Jur., Sec. 1495, that, 'Courts of equity will not entertain a bill for discovery to assist a suit in another court, if the latter is of itself competent to grant the same relief; for in such a case, the proper exercise of the jurisdiction should be left to the functionaries of the court where the suit is depending.' It follows, then, that although at one time courts of equity would entertain bills of discovery in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment these powers were sufficiently enlarged, by competent authority, to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would, at least become inoperative and obsolete. A bill in equity to compel the disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either, in a pending suit at law, would scarcely be resorted to, unless under special circumstances now, when parties are competent witnesses and can be compelled to answer under oath all relevant interrogatories properly exhibited; nor to compel the production of books, deeds, or other documents important as instruments of evidence, when the court of law, in which the suit is pending is authorized by summary proceedings to enforce the same right."

In Preston vs. Smith, surpa, Mr. Justice Brewer said:

"*Finally*, it is claimed that the bill must be sustained because a discovery is sought. I do not understand that a bill can be sustained solely for the

sake of discovery; at least, that is the general rule. Indeed, bills of discovery are rarely, of late, resorted to. They have fallen (if I may be permitted to borrow a phrase from the political parlance of the day) into a condition of 'innocuous desuetude.'"

The present case presents no exception to this rule. So far as the individual defendants are concerned, they can be called as witnesses and compelled to produce their books, papers, documents, and whatever knowledge they may have that may be pertinent can be readily obtained in this manner.

So far as the corporation defendants are concerned, whatever knowledge they have must rest either with their officers, past or present, or in their books, papers, and documents. A corporation could have no knowledge outside of these sources. The books, papers and documents could be obtained upon demand and notice in the law action. The officers and agents, past or present, can be called as witnesses, and be compelled to produce whatever documentary evidence they may have.

If appellant's contention, that the prayer for accounting and allegations of necessity for discovery are sufficient to confer jurisdiction of this entire cause upon the lower court, be maintained, then every action at law, to recover for trespasses or other series of torts, could be brought and maintained in equity by simply asking for an account, and alleging that it was necessary that plaintiff be permitted to secure evidence from the defendants. Upon allegations as to the necessity for discovery there can be no issue or trial. Upon a bill properly framed, the defendants must make the discovery in their answer. All that need be alleged concerning the account, is that complainant needs and desires it. So

that, if this doctrine prevail, in this class of cases, and in fact all cases, even where the purest of legal rights are involved, parties could be deprived of their right of trial by jury, simply by an ingenious framing of a *so-called* bill in equity.

So that whether the element of discovery, under this bill, is considered as standing alone, or as claimed by counsel for appellant to be sufficient to confer jurisdiction of the entire controversy upon the court and to warrant the court in proceeding to grant all of the relief prayed for, we submit that the jurisdiction of a federal court of equity is in no wise aided by the allegations of the bill looking to a discovery.

Counsel for appellant has cited a number of cases to the effect that even since the passage of the Revised Statutes, Sections 724, 858, etc., the federal equity courts have compelled discoveries. Upon an examination of these cases it will be seen that in each case the main relief asked was based upon some well-settled head of equity jurisprudence; and the discovery sought merely incidental to the main relief asked; and the court simply held that, having obtained jurisdiction of the action in equity, and it being a proper case for equitable relief, the court would then proceed to grant discovery or any other incidental relief prayed for.

We have been unable to find a single authority, State or Federal, holding that for pure discovery alone a bill can be maintained.

(a). Again appellant cannot contend that it would be entitled to any discovery of facts under the bill in this action, and the bill cannot be sustained on that ground, for the reason that complainant, by its bill, specifically waives any answer by the defendants under oath, and no interrogatories of any character are specified or set forth in the bill, either in the bill itself or in

a note at the foot thereof. Any answer by the defendants, such as is called for by this bill, not being under oath, would be considered merely as a denial of the allegations in the bill, so as to put complainant on its proof. Such an answer would not be evidence in any sense. Under the Equity Rules adopted by this court, particularly numbers 40, 41, 42 and 43, it is plainly required that where a complainant desires to obtain a discovery of facts from the defendant, special interrogatories must be framed and directed to the defendants in the manner provided by those rules, and the rules plainly indicate that such interrogatories are not to be propounded to be answered otherwise than upon oath. Complainant, having failed to comply with those rules by propounding proper interrogatories, and having elected not to require any answer from any of the defendants which would be evidence in the case, has plainly shown its intention not to present this bill as a bill of discovery in this case, and has waived any right it might have had to a discovery. See:

Huntington vs. Saunders, 120 U. S., 78; 30 L. Ed., 580.
Patterson vs. Gaines, 6 Howard, 550; 12 L. Ed., 553.
Union Bank of Georgetown vs. Geary, 5 Peters, 99; 8 L. Ed., 60.
United States vs. McLaughlin, 24 Fed., 823.
Field vs. Hastings & Bradley Co., 65 Fed., 279.
Excelsior Wooden Pipe Co. vs. City of Seattle, 117 Fed., 140.
Tillinghast vs. Chace, 121 Fed., 435.

In Huntington vs. Saunders, supra, this court tersely laid down the rule as folows:

> "It is not a bill of discovery because the answer under oath of the defendant is expressly waived; no interrogatories are propounded to either of the defendants, no effort made to obtain from them or either of them by way of sworn answer anything which could be used as evidence in the case."

But under the general equity practice and in the absence of any such specific and binding requirement as we find in the equity rules of this court above referred to, the same rule is laid down, that the waiving of an oath to the answer waives the discovery.

> Harrington vs. Harrington, 15 Rhode Island, 341; 5 Atl., 502.
> McCulla vs. Beedleston, 17 Rhode Island, 20; 20 Atl., 11.
> Starkweather vs. Williams, 21 Rhode Island, 55; 41 Atl., 1003.
> Ward vs. Peck, 114 Mass., 121.
> Badger vs. McNamara, 123 Mass., 117.
> Sheppard vs. Akers, 1 Tenn. Chan., 326.
> Goodman vs. Bishop, 145 Illinois, 421; 34 Northeastern, 47.

And in addition under Equity Rules 40 and 41 the mere failure to prepare and present special interrogatories directed to the defendants is fatal to any right to claim discovery in this action. See:

> United States vs. McLaughlin, 24 Fed., 823.
> Daly vs. Young, Fed. Case No. 751.

(b). There is a further ground for denying the complainant's right to maintain this bill for discovery, and that is, that the defendants cannot be compelled to answer upon any matters or to disclose any evidence which

might subject them or might tend to subject them to, or in any way lay the basis for, criminal prosecutions or other proceeding which might result in the imposing of a penalty.

In this case the bill alleges (Trans. p. 14) that the acts of the defendant were "in violation of the laws of the United States, both civil and criminal." Outside of this specific allegation it is apparent upon the face of this bill that any evidence, which might be disclosed, or which would show or tend to show that the defendants had wrongfully entered upon the public domain and cut and removed timber therefrom, would subject them to criminal prosecution for such trespasses. Neither upon the witness stand, nor through the means of discovery in equity, could the defendants be compelled to incriminate themselves by answer or by production of any documentary evidence.

See:

Bates' Fed. Eq. Prac., Sec. 119 and Sec. 199.
Foster's Fed. Prac. (3d Ed.), Vol. 1, p. 290.
Boyd vs. U. S., 116 U. S., 616.
Lee vs. U. S., 150 U. S., 476 and 478.
Leggett vs. Postley, 2 Paige Ch., 599.
Livingstone vs. Harris, 3 Paige Ch., 528.
U. S. vs. Saline Bank, 1 Pet., 100.
Warren vs. Holbrook, 95 Mich., 195; 54 N. W., 712.

But counsel for appellant argues that where the criminal prosecution or liability to penalty is barred by lapse of time, the defendants cannot escape making discovery.

Upon the bill of complaint in this action it clearly appears that the acts complained of are crimes. The bill does not show when the acts were committed. In other words, it cannot be determined from the bill of complain-

ant that the statute of limitations has run as to the acts upon which discovery is sought, and there certainly can be no presumption indulged in that criminal prosecutions are barred.

Again, counsel for appellant argues that as to Margaret P. Daly, executrix, there can be no criminal prosecution or accusation. In some portions of the bill it is alleged (one allegation being found on page 30 of Transcript) that all of the defendants participated in these trespasses. But if nothing personal is intended to be charged against Mrs. Daly in the bill, we submit that the facts alleged are insufficient to compel any discovery or disclosure from Mrs. Daly, because it is not shown that she has any personal knowledge or books or other documentary evidence pertinent to the issue.

Certainly the other defendants, both individuals and corporations, would lay themselves liable to criminal prosecution if they were able to reveal facts as charged in the bill.

(3) *Complainant is not entitled to a discovery for the further reason that the bill is insufficient to show that the discovery is sought in aid of any action at law, conceding for the purpose of this argument that a discovery could be maintained in aid of such action.*

The bill alleges that law actions have been brought, and are now pending, against the defendants, or some of them, to recover for the trespasses referred to in the bill. But, while this allegation is undoubtedly sufficient to show that a recovery is being sought at law for the trespasses complained of, in order to obtain a discovery from any of these defendants it is necessary that the bill allege that said defendants are parties to the law actions, and that this action is ancillary to and in aid thereof.

1 Bates' Fed. Eq. Prac., Sec. 199, page 266.
Story's Eq. Plead., Sec. 259.

COMPLAINANT CANNOT INVOKE THE AID OF EQUITY BY REASON OF ANY FRAUD, MISREPRESENTATION OR CONCEALMENT ALLEGED IN ITS BILL OF COMPLAINT.

The learned counsel for appellant argues briefly that because of the jurisdiction exercised by courts of equity in cases of fraud, misrepresentation and concealment, the lower court should have taken jurisdiction of this action upon that ground.

In the first place, there is no allegation in the bill that any fraud, misrepresentation or concealment in any way enters into complainant's cause of action. The cause of action is in tort for damages for wilful, bold and naked trespasses and conversions. There is no charge that the defendants secured possession of complainant's ground, or were assisted or enabled in any way in the taking and conversion of complainant's property by means of any fraud or fraudulent statement or acts or misrepresentations or concealment. The only fraud, misrepresentation and concealment referred to in the bill was that the cutting was done through the cloak of corporations and various persons, and that the transactions were carried on in such a manner that it was made difficult for complainant to secure satisfactory evidence to support its cause of action.

This suit is not brought on account of the suppression of evidence, or of any fraud, misrepresentation and concealment in connection therewith, but is brought to recover for the wrongful trespasses upon, and the taking of plaintiff's property and the conversion thereof.

Even if a fraud or concealment entered into the cause of action; as stated in Buzard vs. Houston, 119 U.S. 347, it is not every case of fraud which is cognizable in a court of equity. Actions for damages sustained through

fraud; actions of deceit, and, in fact, every cause of action, whether it arises through fraud or otherwise, where the remedy is a legal one for damages, must be brought and prosecuted at law.

The instances, where equity takes jurisdiction of a cause arising through fraud, do not arise because of the fact alone that the causes of action arose through fraud, but are invariably where a party has through his fraud wronged another, and the matter is in such a condition that the wrong cannot be redressed through the ordinary procedure at law, but requires the assistance of a court of equity to reach and bring back the property or otherwise undo as far as possible the wrong complained of.

Further, the allegations of the bill as to fraud, misrepresentation and concealment, are too general and indefinite to sustain the bill upon this ground. While it is true that the evidence itself of a fraud need not be pleaded, still the bill must allege the specific acts or language which constitute the fraud, and not the mere unsustained conclusion of the pleader that fraud has been committed.

In this bill there is no statement as to what any of the defendants actually did which amounted to a fraud upon the government,—how, where or when it was done; but simply the allegation that certain results were accomplished in fraud of complainant's rights.

THE BILL IS SO GENERAL, UNCERTAIN AND INDEFINITE THAT IT PRESENTS NO GROUNDS FOR RELIEF OR DISCOVERY IN EQUITY.

Certain objections, upon the grounds of uncertainty and insufficiency, are presented against the bill in this case, by the demurrers filed, and while it is clear that

the demurrers in this respect are well founded, and that the bill in many respects is insufficient and uncertain, we regard the propositions heretofore argued, so clearly decisive of our contention, that under this bill, complainant has no standing in a court of equity, that we do not feel justified in arguing these objections at length.

But we respectfully submit that a mere reading of the bill will disclose that no attempt is made to allege how any of the alleged acts of defendants were fraudulent or how complainant was injured by any of the allegsd acts of conspiracy or fraud, or how any acts of the defendants, in organizing corporations or otherwise, complicated the situation or made detection difficult or impossible, or concealed from complainant any facts in the case. Nor is it sufficiently averred how the alleged frauds were committed or what means were used to conceal them. There are no facts alleged in the bill which would enable the Court to determine for itself that frauds had been committed or a conspiracy organized and carried out which resulted in any injury to complainant. In fact it appears from the bill that whatever difficulty complainant may be laboring under, is not due to any acts of defendants, but to complainant's delay and negligence in not sooner asserting its rights, if any it has, and in not sooner obtaining and preserving evidence with which to prosecute any violation of those rights. The bill is also uncertain and insufficient in that it shows that from portions of the lands described in the bill, defendants have the right to cut timber by reason of direct permits and license issued by the complainant. Knowledge of what these permits are must lie with complainant, and as complainant shows by the bill that it does not intend to dis-

pute the permits or rights granted thereunder, we submit that the bill should show what lands should be excepted from it, and should be confined to premises concerning which complainant alleges it has a cause of action.

We respectfully submit that irrespective of the jurisdictional defects in said bill, that the said demurrers were well founded, because of the uncertainty and insufficiency of the bill.

It is no answer to the plain truth of the charge, that this bill is indefinite and uncertain in the respects pointed out above and in the particulars heretofore urged in our discussion of the failure of this bill to state a cause in equity, either on the ground of fraud or on the ground that it is brought to establish a trust, or any of the other grounds heretofore discussed in this brief, to say that the bill shows that it is necessarily indefinite and uncertain because of complainant's lack of knowledge and proof as to the various matters charged, or that complainant in part by this bill is seeking to discover the details and facts which it lacks in order to allege a good cause. If discovery were properly sought by this bill upon these matters it might plausibly be claimed that such certainty of allegation, as is ordinarily required, should be dispensed with, but complainant, as we have above shown, does not present any right to a discovery under this bill. If it had any such right at any time it has clearly waived it by waiving an answer under oath and failing to present interrogatories, and it has no right to a discovery for the other reasons heretofore urged. Therefore the bill, if a bill in equity at all is for relief alone and is fatally defective in not stating clearly and precisely the facts essential to make out its cause. See:

Story's Eq. Pleadings, Secs. 253, 257.
Tillinghast vs. Chace, 121 Fed., 435.

This ground of demurrer, that is that the bill was uncertain and insufficient for the various particulars given in the demurrers, was urged before and sustained by the Circuit Court, together with the other grounds of demurrer. Complainant was by the Court given five days within which to further plead or consider as to further action herein. (Transcript, page 26.) After the expiration of the five days, complainant having elected to stand upon its bill and not amending, a decree was entered dismissing the bill. (Transcript, page 27.)

It therefore appears from the record that complainant had a full opportunity to cure these defects in the court below, but elected to waive its right to amend and stood upon its pleading. A decree of dismissal was therefore proper upon this ground of demurrer alone, and for this reason, if for no other, the action of the lower court should be by this court affirmed.

In conclusion, we respectfully submit that the only resemblance which the bill of complaint in this case bears to a bill sustainable in equity is in its form and in the ingenuity displayed by counsel in the frequent use of terms encountered in equity practice, such as "fraud," "account," "trust," etc., and stripping the bill of all unnecessary phraseology and verbiage, and looking only to the facts alleged the controversy presented is reduced to a simple, naked, concrete proposition of law. It presents a claim or money demand for unliquidated damages growing out of wilful trespasses and conversions supportable in a court of law alone. Complainant has recognized this by already filing its law actions. There is no equity presented; no reason for asking the interposition of a court of equity, and we

respectfully submit that the action of the Circuit Court in sustaining the demurrers, and dismissing the bill, and the action of the Circuit Court of Appeals in affirming the action of the lower court were proper, and should be approved and affirmed by this Honorable Court.

Respectfully submitted,

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JOHN F. FORBIS,
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Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 223.

THE UNITED STATES,
Appellant,
against
BITTER ROOT DEVELOPMENT COMPANY AND OTHERS,
Appellees.

Supplemental Brief for Appellees.

A. J. CAMPBELL AND
L. O. EVANS,
Solicitors and of Counsel for Appellees.

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the Supreme Court of the United States,

OCTOBER TERM, 1905.

THE UNITED STATES,
Appellant,

AGAINST

ER ROOT DEVELOPMENT COMPANY
and others,
Appellees.

No. 223.
Supplemental Brief for Appellees.

the above cause, owing to the distance of the residence e parties from the City of Washington and the fact that ounsel for the appellants did not file their brief until ary 2, when the cause was set for hearing in this , counsel for appellees were compelled to pre- their brief in advance of securing a copy of the for appellant. In the appellant's brief we find ast one proposition urged and argued at length first makes its appearance in this case in this and there are also some authorities cited as upon by appellant that were not before called to the tion of counsel, and in order to correct some statements t found in this brief in regard to these matters, coun- r respondents file this additional brief.

the main, the authorities cited by counsel for appellant, dition to those which are referred to in appellee's orig-

inal brief, require no comment beyond a general one that the cases correctly state the law upon the facts adjudicated but have no applicability to the matters and facts set forth in the bill of complaint in the case at bar.

The case of McMullen Lumber Co. v. Strother, decided by the Court of Appeals for the Eighth Circuit, reported in 136 Fed., Page 305 was, in short, a case where a party to a number of lumber contracts involving scattered and very extensive operations had, by means of fraud, rendering false accounts, and by corruption of a trusted agent of the other party to the contract, whose duty it was to see that the contract was fairly carried out, and by entering into conspiracy with the said agent, violated in practically every conceivable way almost every provision of each of these contracts. The situation presented was a most complicated one. The question of the betrayal of his trust by the confidential employee was involved, but the main ground upon which the Court sustained its equitable jurisdiction, while a rather novel and peculiar ground, that is, that the Federal Court, not having the power on the law side to send the case to a referee, as could have been done in the State Court under a statute, would atone for that lack of power by assuming jurisdiction in equity and sending the case to a master, has no possible connection with any of the facts or matters before this Court in the case at bar. After holding that the Court clearly had jurisdiction in equity, the Court went on and made a brief statement to the effect that jurisdiction was also shown on the ground that a trust could be declared in the property wrongfully acquired. This branch of the opinion is very brief and it is difficult to tell just what the theory of the Court was in this regard and difficult to tell as to what the legal rights and remedies of the parties were

in this case, but if the Court meant to hold that a party could follow money into property in the hands of a solvent party, who had acquired the money through a breach of contract or fraud, without any other ground for or necessity of interference in equity, the Court was clearly in error in its ruling.

The case of Broom Manufacturing Co. v. Guyman, 115 Fed., 112, also decided by the Circuit Court of Appeals for the Eighth Circuit, was simply a case where a party brought a suit to rescind on account of fraud a contract of sale of a large quantity of broom corn. It was alleged that the purchaser had no intention of paying for the same at the time the contract was entered into and had immediately thereafter transferred to a trustee all of its property, thus leaving the purchaser without property and, therefore, without means to meet the contract payment. A large amount of the broom straw had already been worked up into brooms, and portions of it had gone through the hands of two purchasers. The only possible remedy at law would have been an action in replevin and as a portion of the broom straw had been worked up into brooms and a portion thereof was in the hands of outside parties, the Court properly allowed the vendor to proceed in equity. We can see no possible relation of the decision in this case to the questions involved in the case at bar.

In the case of Angle v. Chicago & St. Paul Railway Company, a decision of this Honorable Court, reported in 151 U. S., page 25, in which the opinion was written by Mr. Justice Brewer, the only proposition that is claimed to have any bearing upon the question of trust before the Court in this case is the holding of the Court, and one that cannot be questioned, that a party deprived by fraud of his real property has a

clear right to proceed in equity and recover back that specific real property, and cannot be relegated in such case to his action at law for damages. The question arose under a creditors bill, but the Court at that stage of the case treated it, of course, as if the plaintiff was the company which had been defrauded of its real property. It is unquestioned that a party has a right in any case where wrongfully deprived of his real property to demand back that specific property. He cannot be made to accept money damages, or anything else in lieu thereof.

The above are the only cases presented upon the question of whether a trust situation is properly alleged in the bill in the case at bar that in our opinion could have even the slightest connection with or bearing upon the facts and matters stated in the bill of complaint in this action.

In this case mainly upon the proposition asserted by counsel for appellant that the bill can be maintained for the purpose of compelling an accounting by the defendants, and incidentally upon the trust proposition also, counsel for appellant in their brief set forth what they state is a permit typical of those issued to the Bitter Root Development Company briefly referred to in the bill of complaint herein, and from the conditions found in this typical permit, especially that providing for the filing of monthly statements by the Bitter Root Development Company, counsel contend that a contractual or fiduciary relation is established between the parties to this action and such a relation as would subject the defendants to an accounting in this action.

Counsel for appellant complain that the Circuit Court of Appeals disposed of the question of their right to an accounting by treating the wrongs complained of as mere trespasses and torts, and that that Court entirely overlooked this provision in the permit by which the Bitter Root De-

velopment Company agreed to file monthly statements, and also the other conditions in the permit. It is not strange that no reference appears in the opinion of the lower court to this or any other special condition contained in these permits, as no question under the permits was presented either by the bill of complaint or by the briefs of counsel or upon the oral argument. In fact this contention and any contention as to the permits or their nature, is first made, and first heard of in the brief of the Government filed in this cause on January 2 of this year.

But many reasons may be given which show clearly that this contention under these permits or any contention of merit in the bill by reason of these permits is clearly outside of the record in this case.

In the first place, nothing is claimed in the bill of complaint because of these permits or anything done in connection with the ground covered by the permits. The bill simply alleges that permits were issued to the Bitter-Root Development Company to cut timber upon certain small portions of the tracts described in the complaint. It was plainly not the purpose of the Government to charge that anything improper had been done under the permits or upon the ground covered thereby, but it was then alleged that these permits were used as a cloak under which the adjoining and other lands of the Government were despoiled. It is plain that the Government in this action was not complaining of the operations of the parties under these permits or as to the ground covered by them, but it is impossible to glean from the bill how the permits could have been used as a cloak in or as an aid to the denuding of other grounds. The Government had records of all these permits and the ground covered by them. The Government agent finding a party upon a certain tract of land or in a certain

neighborhood merely had to make reference to his record of permits to see whether the operations were upon the licensed ground or not.

In the second place, there is nothing in the bill of complaint, any allegation or statement, which would reveal to this Court the conditions of the permits referred to by counsel, or any other of the contents of the permits, and, therefore, no question can be raised thereunder. All that this Court knows from the pleading or can know is that some kind of a permit was issued. To hold, as contended by counsel for the appellant, that the Court takes judicial notice of the contents of these permits or any of them would be simply to hold that this Court takes judicial notice of every act performed in the Land Office or through or by the Interior Department. Under the statute of 1891, the Secretary of the Interior was given power upon such conditions and in such manner as he saw fit to issue permits to cut timber upon the public domain. Under this general grant, the Secretary no doubt issued thousands of such permits, and, possibly, no two of which were in the same form or contained the same conditions; and to hold that this Court can judicially know without evidence what was contained in each of those permits would be simply to hold that there being an Act of Congress giving the Land Office power to issue patents to mineral and other public lands, that this Court would take judicial notice of every patent issued and every contract made by the Land Department under those statutes and that it would no longer be necessary for a party in a civil suit to plead or prove the patent or contract by which he acquired title from the Government. It is a moot question, so far as our investigation goes, as to whether the United States Courts would even take judicial notice of the public and

general rules and regulations of the Land Office, at least one of the lower Federal Courts having held to the contrary, and there having been no decision of this Court upon this particular point, but it has never before even been contended, we believe, that any Court would go to the extent contended for in this cause.

In the third place, even if it be before the Court that the defendant, the Bitter Root Company, had taken these permits upon condition that it would file monthly statements, there is no claim in the bill of complaint that full, fair and complete statements and reports were not filed, showing all the transactions of any of the defendants under these permits, and in the absence of such an allegation, in the absence of a charge that the defendants have not voluntarily done everything required of them, what necessity is there for bringing the matter into any court?

In the fourth place, if it be conceded that counsel are correct and that this Court will take judicial notice of the contents of these permits, we submit that the Court must also take judicial notice of the statements and reports filed by the Bitter Root Company under these permits and will thus judicially know that all of these conditions have been at the times required fully complied with.

There are many other reasons that might be suggested for eliminating the question of permits from this case, for instance, first that the permits only ran to the defendant, the Bitter Root Company, which is not before this Court and has never been brought into the cause, and as the permits were by their terms not transferrable or assignable clearly none of the other defendants could claim any protection under the permits and incurred no obligation thereunder; and the further reason that it appears that these permits covered but a small and inconsiderable por-

tion of the ground described in the bill of complaint and no complaint is made as to that ground, clearly no obligation would arise as to any ground except that covered by the permits; and the further reason that these permits merely contain conditions under which the Bitter Root Company was licensed to do certain acts upon the ground in question, and created no obligation upon the defendant except that the permits must have been followed to have made its entry under the ground lawful, and that no relations of a fiduciary character were established by the giving and accepting of this permit. But, conceding that all of appellant's contentions as to these permits are correct, that they were issued, that their contents are before the Court, and still, as we submit we have plainly shown in our original brief, no necessity would exist for taking the controversy into a court of equity, as the Government has the clear legal right to disregard the permits, charge the defendants as willful trespassers upon the ground covered by the permits as well as that outside, and require the defendants to come into Court and assume the entire burden of proving the issuance of these permits and their compliance with each and every valid condition therein.

In appellant's brief upon the question of the right of the Government to maintain the cause in equity because one of the defendants, Mrs. Daly is sued as administratrix, the statement is made that the bill in this case specifically prays a discovery of assets by this administratrix. We have been unable to find any such prayer or request in the bill, but its mere presence in the prayer would add nothing, as there is no allegation which would support such a prayer, and on the contrary, the bill entirely negatives the propriety of any prayer for discovery of assets, or any discovery by the

administratrix, by clearly and repeatedly stating that the administratrix had at the time of the filing of the bill in her possession a sum six times that claimed by the Government as the outside extent of its damage in this case, which amount was in the hands of the administratrix ready and available to meet the claim of the Government when liquidated or any other proper claim against such funds.

It is also suggested by counsel for appellant that if this bill contained a prayer for injunction, no question of the right to proceed in equity could be raised. The mere prayer for injunction, of course, would avail nothing in the absence of the necessary allegations of fact to support such a prayer, and such allegations are entirely wanting in the bill in this case. Of course, if the proper allegations had been set forth in the bill, entitling the cemplainant to injunctive or any other equitable relief, and a proper prayer made, it would have to be conceded that the bill could be maintained, but in this case the bill contains nothing which would show that the Government claims that the trespass or waste is being continued, and in fact the bill shows that the transactions are passed and closed.

As must be apparent to this Court, it is impossible to ascertain from the bill in this cause how the remedy in equity would be more efficient than at law, but we submit that the real reason for the anxiety of counsel for appellant to proceed in equity, instead of prosecuting the law actions now pending, is frankly revealed by the statements of counsel contained on Page 42 of their brief and upon the oral argument. These objections are simply objections to the system of trial by jury generally, and, further, are due to an evident belief of counsel that they could more satisfactorily adduce their proof, especially from unwilling witnesses, in the convenient, and ac-

commodating practice had in equity before an examiner, and it seems to be mainly based upon the assumption that the witnesses produced would not tell the truth. As to the opportunity which would be given the complainant to examine the books and papers required, that opportunity would be as full and complete and in fact the same under Section 724 of the Revised Statutes as that which could be afforded before a master. It is presumed that the witnesses called will speak the truth, and none of these trivial objections can be taken seriously when weighed against the right of trial by jury guaranteed to these and all other defendants in similar cases.

We respectfully submit that the action of the lower Courts should be by this Court affirmed.

Respectfully submitted,

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Solicitors and of counsel for appellees.

A. J. SHORES,
C. F. KELLEY and
JOHN F. FORBIS,
of Counsel.

Supreme Court of the United States.

No. 223.—October Term, 1905.

The United States of America, Appellant,
vs.
Bitter Root Development Company (a corporation), Anaconda Mining Company (a corporation), Anaconda Copper Company (a corporation), Anaconda Copper Mining Company (a corporation), Margaret P. Daly, Margaret P. Daly as Executrix of the last will and testament of Marcus Daly, deceased, John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy, Appellees.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

[February 19, 1906.]

The appellant filed this bill of complaint in the Circuit Court of the United States for the District of Montana, on the equity side of the court, for the purpose of recovering from the defendants the value of certain timber, alleged to have been wrongfully cut and taken by the defendants and converted to their own use from the public lands belonging to the complainant in the State of Montana. The defendants, those of them who appeared, demurred to the bill on the ground, among others, that a court of equity had no jurisdiction over the cause of action set up in the bill, for the reason that complainant had a plain, full, and adequate remedy at law therefor. The Circuit Court sustained the demurrer and granted leave to the complainant to amend, but the complainant elected to stand by the bill, and the same was thereupon, finally, dismissed. The case was taken to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was affirmed, (133 Fed. Rep. 274,) and the complainant has appealed here.

(It appears from the return of the marshal that, after diligent search, no service of process could be made on the defendants, Bitter Root Development Company, Anaconda Mining Company and Anaconda Copper Company, (corporations,) as they could not be found.)

The bill alleged that on the 1st day of April, 1888, the complainant was, and at the time of the filing of the bill continued to be, the owner in fee and in the possession of certain lands in the State of Montana, described in the bill. Description of the lands from which the timber was cut and carried off was given at great length and a large number of sections of land were included therein:

"2. Your orator further shows that on the day and year last aforesaid, on these vast tracts of land there were then growing and standing great forests of pine, fir, and other kinds of trees of various dimensions, fit to manufacture into lumber for mining, commercial, and all other purposes for which lumber is used; that said forests were of great value, to wit, of the value of two million dollars ($2,000,000) and upwards, the exact value thereof being to your orator unknown; that these forests and the land upon which they were growing and standing were the absolute property of the complainant, the United States of America, and was a portion of its public domain.

"3. Your orator further shows that on this the day of filing its bill of complaint in this court the lands above described have for the most part been stripped of the pine and other trees and timber that were standing and growing upon them as aforesaid, and, except very small portions thereof, were so denuded without license, authority, or permission of the United States or any one authorized to represent the complainant; and this was done in violation of its laws, both civil and criminal, and thereby and in consequence of said spoliation the complainant has lost millions of dollars' worth of its property under circumstances named in the succeeding paragraphs of this bill of complaint.

"4. Your orator further shows that one Marcus Daly, who is now dead, but who was on the date and year aforesaid a citizen of the State of Montana, and a resident thereof, well knowing of the location of these lands, their accessibility, and the great value of the timber then growing thereon, did, on or about the 1st day of January, 1890, determine that he would convert and appropriate to his own use all of the merchantable and marketable timber growing and standing thereon, without buying said timber or obtaining any right or authority, except as hereinafter stated, from your orator, the United States of America. That in order to more effectually carry out these designs and purposes, to conceal his identity, to enrich himself individually, to escape personal liability, and to better deceive the public and the lawful officers and agents of the complainant, he determined that he would organize a corporation under the laws of the State of Montana; and for that purpose the said Daly called to his aid and assistance certain other persons, namely, John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcom B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy and Joseph V. Long, and by conspiracy and confederation with said parties, and in pursuance of such fraudulent purpose as aforesaid, they organized, on or about the 12th day of August, 1890, the Bitter Root Development Company, the defendant. In its articles of incorporation, which were duly filed with the secretary of State of Montana, said John R. Toole, William Toole, and James W. Hamilton were named as incorporators, and James W. Hamilton, William Toole, Daniel J. Hennessy, John R. Toole, and William W. Dixon were named as trustees to manage the affairs of the company for the first three months of its existence, and the town of Hamilton, in said State, was named as the principal office of said corporation. The capital stock of said corporation was fixed at the sum of three hundred thousand dollars ($300,000.00), divided into one hundred thousand shares, of the par value of three dollars ($3.00) per share.

"5. Your orator further shows that said incorporators and trustees had but a nominal interest in said incorporation, but certain of them were

agents, and others, attorneys of said Marcus Daly, and as such conspired with him as to the manner and means by which his said purpose to denude said lands of your orator could be best carried out. In pursuance of such conspiracy it was necessary that a certain number should subscribe for stock in said corporation, which was done, but all of said shares were in fact subscribed for the use of and controlled by said Marcus Daly. Your orator charges that not only in the formation of said corporation and other corporations to be hereinafter named said John R. Toole, William Toole, William W. Dixon, James W. Hamilton, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessy, and Joseph V. Long aided and assisted said Marcus Daly, but in many other ways up to the time of his death they engaged with him in the work of spoliation, which, in pursuance of such conspiracy, had been planned and was later carried out as hereinafter particularly described; and said parties other than Daly participated in the profits thereof, but just how and to what extent is to your orator unknown; and your orator shows that such of the above as are not made defendants herein are either dead, outside of the jurisdiction of this court, or have no estate.

"6. Your orator further shows that at once on the organization of this corporation, and under the corporate name thereof, said parties heretofore named commenced the work of cutting and carrying away from said lands the trees and timber then growing and standing thereon, using at first in their operations several portable sawmills, but later, on or about the year 1892, a large lumber and sawmill was erected at the town of Hamilton or Bitter Root River, in close proximity to a portion of the lands above described and the timber growing thereon. The work of cutting, hauling, transporting to the river, and driving the timber to said mill and manufacturing the same into lumber was prosecuted with great and unremitting industry for several years thereafter, to the great profit and advantage of the said conspirators and to the great loss of your orator.

"7. Your orator further shows that not only at the time of the organization of said corporation, but at all times while it was doing business, its officers, directors, trustees and stockholders acted for and in behalf of said Marcus Daly as his agents, and had knowledge of its principal operations, and well knew that the logs that were being brought to its mill and converted into lumber were taken, without right or authority, from the public domain of your orator, and that they had no legal right or title to the same, except as to a small fraction thereof, as hereinafter stated.

"8. Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by the other parties and as aforesaid, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and under cover of such permits said conspirators not only cut, carried away and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, they willfully and fraudulently entered upon large tracts of lands adjacent thereto, and cut, carried away, drove and manufactured the timber growing thereon, and afterwards sold the lumber and

timber to persons and corporations to your orator unknown and known only to Marcus Daly, his agents and the officers of said Bitter Root Development Company, and appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom beside said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time, it is impossible for your orator to say, as all books of account, of every kind and character, were then and are now in their possession, under their control, or with their assigns.

"9. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and the other parties before mentioned engaged the services of a large number of men, falsely representing that they had authority from your orator to cut the growing timber on tracts of land not included in any license, and made contracts with such men, by the terms of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, by reason of which representations and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank, and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts and enable them to successfully prosecute the same.

"10. Your orator further shows that in pursuance of said conspiracy, and in the execution thereof, the said Daly and his associates, acting through and under the corporate name of the defendant, Bitter Root Development Company, entered into other contracts or agreements with other parties, namely, Kendall Brothers, Harper Brothers, G. L. Shook, William Toole, Andrew Kennedy, D. V. Bean, John Ailport and divers other persons to your orator unknown, by the terms of which they were to be paid specified prices per thousand feet board measure for logs delivered at the sawmill at Hamilton, both parties to said agreements well knowing at the time that the timber belonged to your orator and was to be unlawfully cut and removed. Said contractors, so called, acting for and in behalf of said Marcus Daly and his said confederates under the name of the Bitter Root Development Company, during the year 1891 and for several years next thereafter, willfully trespassed upon the hereinbefore-described lands of the complainant, cutting millions of feet of logs and hauling them to the Bitter Root River and thence to the mill of the defendant, Bitter Root Development Company, at Hamilton, where they were converted into lumber and sold to the general public, and the proceeds thereof appropriated in large part by said Marcus Daly and the balance by his associates in said conspiracy, but just how much, and in what proportion, your orator, for the reasons above stated, is unable to say.

"11. Your orator further shows that the said Marcus Daly and his associates, in further execution of said conspiracy, organized other corporations for the purpose of concealing their illegal acts and complicating and confusing the situation, so as to make detection and proof of the same difficult, if not impossible. One of these schemes was as follows: On or about the 14th day of January, 1891, they organized a corporation known as the Anaconda Mining Company, with an organized capital stock of $12,500,000, divided into 500,000 shares of the par value of $25 per share; that within less than one year thereafter, namely, on the 5th day

of December, 1891, a stockholders' meeting was held in the city of Butte Montana, and at said meeting the capital stock of said corporation was increased to twenty-five million dollars ($25,000,000.00) and the shares thereof increased to one million (1,000,000) shares; that at said stockholders' meeting it appeared that no one of the incorporators or the trustees that were named at the time of its incorporation a few months before had any substantial interest therein; and later, namely, on the 31st day of December, another meeting of said stockholders was held, at which time it was voted to extend the term of existence of said corporation for forty years from the date of its original incorporation, and at that meeting it appeared that Marcus Daly, either in his own person or as trustee or as a proxy, controlled nearly seven hundred thousand (700,000) shares of the million shares of the capital stock of said company, and in less than six months thereafter the capital stock was reduced from twenty-five million dollars ($25,000,000,00) to one million dollars ($1,000,000.00), and the shares from one million to forty thousand (40,000).

"12. Your orator further shows that in furtherance of the conspiracy aforesaid the said Marcus Daly on the 27th day of April, 1894, through his agents procured to be conveyed unto himself all of the property of said Bitter Root Development Company, receiving a deed from said Bitter Root Development Company, executed by William Toole as its president and Joseph Kerrigan as its secretary, which said deed was duly recorded on page 302 of book 16 in the proper office for the recording of deeds in the county of Ravalli, State of Montana. In said deed appear these words: 'The Bitter Root Development Company, for and in consideration of one dollar, transfers all of its property of every kind and description, real and personal, timber lands, timber cutting privileges and rights, timber, logs, mills, water rights, and water ditches, flumes, pipe lines, and rights of way—in fact, everything belonging to the Bitter Root Development Company—to Marcus Daly.'

"Your orator further says that four days after so receiving this deed, namely, on the 1st day of May, 1894, said Marcus Daly deeded this same property to the other of his corporations, the above-named Anaconda Mining Company, for the express consideration of one million four hundred and forty-two thousand three hundred and seventy-nine dollars and forty-six cents ($1,442,379.46), which said deed was duly recorded in said book 16, on page 280. Your orator expressly charges that said Marcus Daly did in fact receive the consideration named in said deed, the whole thereof being directly the result of the spoilation of the lands of your orator as aforesaid, and that the moneys so received by him belonged in fact to your orator; but your orator charges on information that said Marcus Daly did not receive all of the same in cash, but a portion of same was taken in stock in said Anaconda Mining Company, but just how much he received in cash and how much was carried over and appeared in stock of said company your orator is unable to state.

"13. Your orator further shows that in furtherance of the conspiracy aforesaid, said defendants, Moses Kirkpatrick, William Scallon, and Malcolm B. Bromley, acting for and in behalf of said Marcus Daly, on the 6th day of June, 1895, pursuant to and in conformity with the statutes of Montana relating to corporations for industrial and productive purposes, organized the Anaconda Copper Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into three hundred

thousand (300,000) shares of the par value of one hundred dollars ($100.00) each, with an authorized term of existence of forty years, and the following-named persons were named as trustees for the first three months of its existence, to wit, Moses Kirkpatrick, William Scallon, Malcolm B. Bromley, Michael Donohue, William L. Hoag, Daniel J. Hennessey, and Joseph V. Long, with its principal office at Butte, Silverbow County, Montana.

"14. Your orator further shows that nine days thereafter the same persons, named as incorporators of the corporation last named, organized under the same law the defendant corporation, the Anaconda Copper Mining Company, with an authorized capital stock of thirty million dollars ($30,000,000.00), divided into one million two hundred thousand shares (1,200,000) of the par value of twenty-five dollars ($25.00) each, with the same seven trustees to manage the affairs of said corporation for the first three months of its existence, with its principal office at Anaconda, in said State.

"15. Your orator shows that in the execution of said conspiracy, and for the purpose of complicating the situation, said Marcus Daly, through his agents, did again, and within one year and twenty-nine days after having transferred his property to the Anaconda Mining Company, convey the identical property that was named in said deeds to the above-named Anaconda Copper Mining Company for and in consideration of the sum of one dollar, the Anaconda Mining Company executing a deed through and by its president, W. W. Dixon, and its secretary, F. E. Sergeant, and said deed is recorded in the same book of records on page 441.

"16. Your orator further shows and charges that these several conveyances were made in the main in furtherance of said conspiracy, and in pursuance of a purpose to so complicate the situation as to make detection difficult, if not impossible. That the conveyance by the Bitter Root Development Company to said Marcus Daly, for one dollar, of all of its property was fraudulent, and that said Marcus Daly did, under the name of the Anaconda Mining Company, carry on the same work of spoliation of your orator's trees, timber, and lands, and that later, and from the time of the conveyance of all its corporate property to the Anaconda Copper Mining Company, he carried on the work under that name until the date of his death. That he continued to use the same means, the same mill at Hamilton, and the officers, directors, and stockholders of each of said corporations knew of the illegal work that had been done, and so knowing continued the same. And your orator expressly charges that all of the corporate assets of every kind and character of the Bitter Root Development Company either appeared in the stock of the other corporations or was appropriated by Marcus Daly and his assistants to their own use and benefit; but just how much was carried over in the said corporations, and how much was divided previous to the last deed named herein, and how much of the property of your orator was converted by said last-named company between the date of its organization and the death of said Marcus Daly hereinafter described, and how much thereof was appropriated by said company and how much by Daly and his associates, it is impossible for your orator, with the means at hand, to state.

"17. Your orator further shows that by reason of such spoliation, continued and carried on during the period of about ten years, it has lost property of great value, to wit, of the value of two million dollars and upwards, and that Marcus Daly and the other defendants named herein

occasioned this loss by willfully trespassing upon said lands of your orator, and without its consent, or the consent of any of its authorized officers, and in violation of its laws, both civil and criminal, appropriated and converted to their own use the trees and timber growing thereon. That said defendants, or some of them, have had at all times and now have possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them; but by reason of the frauds practiced by said defendants, as aforesaid, and their acts performed for the express purpose of concealing from your orator the facts of the case by means of the formation and the dissolving and the reforming of corporations, and by reason of said defendants having possession of all books of account it is impossible for your orator to set forth to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just when and to whom the logs when manufactured into lumber were sold, or just when and by whom the proceeds thereof were obtained and when the same were divided.

"18. Your orator further shows that at the time that these trespasses were committed the territory on which the same took place was but sparsely settled, and was thousands of miles away from the seat of government, and it was impossible with the means that your orator had at hand to properly patrol and protect its domain from the willful trespasses of the defendants, and that the Government of the United States used such care in the protection thereof as it had the means to do. That the agents employed by your orator were misled by the defendants' assertion of ownership, as aforesaid; that the frauds and trespasses of the defendants, which have resulted in the denuding of these lands of your orator and in depriving your orator of property of the value of several millions of dollars, were not discovered in their entirety until a comparatively short time ago.

"19. Your orator further shows that it has commenced several actions at law in this honorable court to recover the value of the timber heretofore taken by the defendants, or some of them, from the lands above particularly described, and that the same are now pending in this court, but that, by reason of the frauds and conspiracies above set forth and the complications which have resulted therefrom, no plain, adequate, and complete remedy can be given your orator by said actions at law, and your orator is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

"20. Your orator further shows that Marcus Daly died in the city of New York on the 12th day of November, A. D. 1900; that at the time of his death he was a resident of the county of Deerlodge, State and District of Montana, and left an estate worth about $12,000,000, consisting of real and personal property located in said county and State and elsewhere, and your orator expressly charges that a large portion of said estate was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator, as hereinbefore charged, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit; that in his lifetime he made and published his last will and testament, whereby he appointed the defendant, Margaret P. Daly, executrix thereof; that on the 14th day of February, A. D. 1901, at the city of Anaconda, said last will and testament was duly proved and duly admitted to probate in the District Court of the county of Deerlodge, District of

Montana; that thereupon, on the 15th day of February, A. D. 1901, letters of administration were duly issued thereon to the said defendant, Margaret P. Daly, by the said court; that the said defendant, Margaret P. Daly, duly qualified and entered upon the discharge of her duties as executrix, and that the said letters testamentary have not been revoked and are now in full force and effect.

"21. Your orator further shows that the said Margaret P. Daly, under and by virtue of the terms of said will and, as the wife of said Marcus Daly, is now the owner of a large portion of his estate.

"In consideration whereof, and forasmuch as your orator is, for the reasons stated, remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and relievable, to the end that your orator may have that relief which it can only obtain in a court of equity; and that each one of the defendants above named may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator prays the court as follows:

"First. That the defendant, Margaret P. Daly, both in her own person, and as executrix of the last will and testament of her husband, Marcus Daly, deceased, and each of the defendants above named, be decreed to hold in trust for the use and benefit of your orator so much of their estate, both real and personal, as shall have come to them, or either of them, directly from the proceeds of the conversion of the timber of your orator, as aforesaid.

"Second. That the complainant have and recover from Margaret P. Daly, both personally and as executrix, and from each of the other defendants above named, the profits, gains and advantages which the said defendants, or either of them, have received or made or which have arisen or accrued to them, or either of them, by reason of the willful trespasses upon the public domain of your orator, hereinbefore particularly described, and by reason of the fraudulent conversion of the trees and timber growing thereon, the logs had therefrom, and the lumber manufactured from the same.

"Third. That each of the defendants may make a full and true discovery and disclosure of and concerning the transactions and matters aforesaid, and that an accounting may be taken by and under the direction and decree of this honorable court of all the dealings and transactions between your orator and the defendants. That on such accounting the defendants and each of them be required to produce all licenses, permits, and all other documents of every kind and character which they, or any of them, may have received from your orator, by which they, or any of them, claim or claimed the right to enter upon any of said lands of your orator and cut and remove the trees and timber then growing thereon.

"Fourth. That the defendants and each of them account for the number of logs received by them and manufactured into lumber at the sawmill at Hamilton, in said district, or at any other mill or mills owned or used by them in the manufacture of said logs into lumber, and also the gains, profits, and advantages which the said defendants, or either of them, or the estate of said Marcus Daly, have received or made, or which have arisen or accrued to them, or either of them, from trespassing upon the lands of the complainant, above described and set forth, and in converting to their own use and benefit the trees and timber growing thereon.

"Fifth. That the said defendants and each of them discover and set forth full, true, and particular accounts of all and every sum or sums of money received by them, or either of them, or by any person or persons by their, or either of their, order, or for their, or either of their, use, for or in respect of the said sale or sales of logs cut from said lands of said complainant, or the lumber obtained from said logs, and when and from whom each and every of such sums were, respectively, received, and how the same, respectively, have been applied or disposed of, and to show when and where the proceeds of said sales were invested by each of said defendants, and in what form of real or personal estate they now exist.

"Sixth. That the defendants, and each of them, may set forth a list or schedule and description of all books of account of every kind and character, and of all deeds, documents, letters, papers, or writings of every kind whatsoever relating to the matters aforesaid, or any of them, wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which are now or ever were in their or either of their possession or power, and more particularly described, which now are in their or either of their possession or power, and may deposit the same with the clerk of this court or with the standing master in chancery thereof for the purposes of inspection and examination by your orator, and for all other legitimate and usual purposes, in order that your orator may ascertain therefrom and thereby the particular facts and circumstances, which is absolutely necessary in order to enable your orator to obtain possession and knowledge of the details of this conspiracy; and that when such accounting shall be made, and it shall be ascertained that said defendants have received and taken into their possession money or other forms of property directly resulting from their participation in the conspiracy aforesaid, and in the spoliation of the lands of your orator as aforesaid, that this court shall decree that they pay the amount thereof, with interest from the date they so received the same, to your orator, with costs of this suit, and that your orator may have such other and further relief in the premises as the nature and the circumstances of this case may require and as may be agreeable to equity and good conscience.

"May it please the court to grant to your orator a writ of subpœna to be directed to the said Margaret P. Daly; Margaret P. Daly, as executrix of the last will and testament of Marcus Daly, deceased; Bitter Root Development Company, Anaconda Mining Company, Anaconda Copper Company, Anaconda Copper Mining Company, John R. Toole, William W. Dixon, William Scallon, Daniel J. Hennessy, thereby commanding them, and each of them, at a certain time, and under a certain penalty to be fixed, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer to make to all and singular the premises, and to stand to, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall be meet and agreeable to equity, and your orator will ever pray."

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

Although there is a liberal use in the bill in this case of averments in regard to fraud, conspiracy and violation of trust, of which the pleader avers the defendants have been guilty, in various ways, yet upon a careful

examination of the pleading itself, and the actual facts therein stated, we concur in the view of the courts below, that the action is really nothing but an action of trespass or trover to recover damages sustained by the complainant by reason of the wrongful cutting, carrying away and conversion of the property of the complainant, consisting of the timber on the land mentioned in the bill; and for the wrong thus done we think it clear that the complainant has a plain, adequate and complete remedy at law, and consequently the court has no jurisdiction of this bill in equity.

It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature, equity has no jurisdiction, provided the complainant has a full and adequate remedy at law for the wrongs complained of. (*Buzard* v. *Houston*, 119 U. S. 347; *Scott* v. *Neely*, 140 Id. 106, 110.) A mere charge of fraud does not give equity jurisdiction. (*Buzard* v. *Houston, supra*; *Ambler* v. *Choteau*, 107 U. S. 586; *Safford* v. *Ensign Manufacturing Co.*, 120 Fed. Rep. 480, and cases cited in opinion.) *Tyler* v. *Savage*, (143 U. S. 79,) bears no resemblance to the case at bar. As the court there said, there were in the case discovery, account, fraud, misrepresentation and concealment. There was no demurrer for multifariousness, and no objection in the court below for want of equity, and the case was not one of a plain defect in equity jurisdiction. The suit was clearly one for equitable relief.

The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than a difficulty in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort feasors, and the various devices alleged to have been resorted to by the deceased, Daly, by way of organizing different corporations, in order to, as alleged, cover up his tracks and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. It is simply a question of evidence to show who did the wrong, and upon that point the fact could be ascertained as readily at law as in equity.

The complainant is entitled in an action at law to an inspection of the books and records of these various corporations, and it has the same power to obtain the facts therefrom in that action as it would have in this suit in equity.

The complainant contends that where property has been stolen, or obtained by fraud, equity recognizes the law to be that the property always belongs to the true owner, and therefore its proceeds must also belong to him and may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith. The cases of *Newton* v. *Porter*, (69 N. Y. 133,) and *American Sugar Refining Co.* v. *Fancher*, (145 N. Y. 552,) are cited to sustain the contention. These cases, it will be seen upon ex-

amination, show that the plaintiff had no remedy at law, and he was able to fully identify the particular property into which the original property belonging to him had been converted, and which was in the hands of a voluntary assignee. It was a question of following the proceeds, and accurately and certainly identifying them, which the court held was necessary in order to permit of such following. The defendants were also insolvent. The case of *Angle* v. *Chicago, St. Paul etc. Railway Co.*, (151 U. S. 1,) did not involve any question like the one herein. In that case the land had been granted to the Portage Company by the State for the purposes named, and it was conceded by the demurrer that the officials of the Portage Company had been bribed by the Omaha Company to betray their trust, and the legislature had been induced by false allegations to revoke the grant to the Portage Company and to bestow it upon the Omaha Company. The plaintiff had obtained a judgment against the Portage Company in an action at law, and the execution had been returned *nulla bona*, and the bill in equity was filed in the Circuit Court of the United States by the administratrix of the judgment creditor against the Omaha Company to reach the land formerly owned by the Portage Company and then in the hands of the Omaha Company by reason of its own wrongdoing. Thus there was the illegal and wrongful act of the Omaha Company, by which the land once vesting in the Portage Company had been taken away and that same land regranted to the Omaha Company, and it was to reach that particular land which the Omaha Company had obtained by its wrongful act that the bill was filed. Mr. Justice Brewer, delivering the opinion of this court, said:

"And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property."

These lands were identified, and were found in the hands of the actual wrongdoer, who had acquired them by reason of such wrong.

Now, there is no pretense in this case that any specific piece of property was in fact either the same timber or the proceeds of the timber wrongfully cut and disposed of by the defendants, or any of them. Nor was it averred that any particular timber had been taken from the land described in the bill. On the contrary, it is alleged in the bill that the complainant was unable to show just when or by whom the cutting had been performed, or the logs manufactured into lumber had been sold, or just when and by

whom the proceeds thereof were obtained and when the same were divided. There is a general allegation in the bill of complaint that the deceased, Daly, left an estate worth $12,000,000, located in the State of Montana and elsewhere, and that a large portion of that estate was the result of the proceeds of Daly's illegal acts in his lifetime, in trespassing upon the lands of the complainant, and converting the proceeds of the sale of the timber growing thereon to his own use and benefit. It is also averred that he made his will, appointing Margaret P. Daly, defendant, executrix; and the will was duly admitted to probate, and letters of administration were duly issued to the defendant, Margaret P. Daly, on the 15th day of February, A. D. 1901, and she duly qualified and entered upon the discharge of her duties as such executrix; that Margaret P. Daly, under and by virtue of the terms of the will, and as the wife of Marcus Daly, is the owner of a large portion of his estate. It is plain that such allegations fall far short of even a pretense of identifying specific, definite property as the proceeds of certain other property wrongfully or fraudulently taken by defendants from the lands described in the bill. Such allegations are totally inadequate for that purpose.

Under the law providing for the examination of defendants, and under section 724 of the Revised Statutes, providing for the production of books and writings in actions at law, under the same circumstances that defendants migh be compelled to produce them under the ordinary rules of proceeding in chancery, there is nothing in these allegations, which shows any necessity for a discovery in equity, such as would render the remedy more adequate therein than in an action at law.

Nor was there anything in the cases cited by complainant as showing a right to proceed in equity because one of the defendants is the executrix of a deceased person, who, it is alleged, was one of the parties guilty of the wrongdoing set forth in the bill. Upon the question of liability she is entitled to a trial at law and by jury, as well as the other defendants. In *Green's Administratrix* v. *Creighton*, (23 How. 90,) it was said that a single creditor has been allowed to sue an administratrix for his demand in equity, and obtain decree for payment out of the personal estate, without taking a general account of the testator's debts. In that case the facts were complicated; the original debtor and his surety were dead, and had died insolvent, and a portion of the assets of the estate of the latter could be traced to the possession of his administratrix, and the authority of a court of equity was required to call for a discovery of the nature and amount of the assets in hand. It was said that the debtor, Tunstall, had died insolvent, and Whiting, his surety, had also died insolvent. A portion of the assets belonging to the estate of the latter was in the hands of the surety of this administrator. A discovery of the nature and amount of the assets in hand was necessary if they were subject to

the application, and it was held that the Circuit Court was authorized to entertain the suit, and the decree dismissing the bill was reversed. Certainly there is nothing in that case which in the least degree aids the proposition that because there is an administratrix named as a party, equity has jurisdiction, even though no discovery of assets is sought, and the bill shows that the estate represented by the administratrix is largely solvent, and the demand is for unliquidated damages against others besides the administratrix, and no debt is admitted, the alleged cause of action having arisen against the deceased, among others, for a tort.

In *Kennedy* v. *Creswell*, (101 U. S. 641,) it was held that the creditor of a deceased person had a right to go into a court of equity for a discovery of assets and the payment of his debt, and that when there he would not be turned back to a court of law, to establish the validity of his claim. The basis of getting into a court of equity being a discovery of assets, the object of the bill was obtained, as the court held, by the admission of the executor, that he had sufficient assets, and that if so, the jurisdiction of the court remained to give a decree for the payment of the debt. Here is no such case. Daly is alleged to have been the principal wrongdoer, out of several defendants, in cutting and converting the timber on these lands owned by the Government. He died, leaving an estate of over $12,000,000, as averred in the bill of complaint, and the claim of the complainant is only for $2,000,000. Thus, by complainant's own averment, the estate is largely solvent. There is no endeavor to discover assets and no ground for jurisdiction in equity, simply because one of the defendants is an executrix. The proposition of the complainant would confer jurisdiction in equity in every case of a legal cause of action for unliquidated damages for a tort, where one of the wrongdoers had died and an administratrix had been appointed, and the existence of assets was alleged by complainant, largely in excess of the complainant's demand, and the other defendants remained parties. This has never been so held in any case to which our attention has been called, and we are unable to find any principle of equity jurisdiction upon which to permit the maintenance of this suit on the special ground here asserted.

But it is averred there was a fiduciary relationship existing on account of the permits or licenses to cut timber, which, it is alleged, were given the defendant, Bitter Root Development Company, and that in such permits there was set forth an obligation on the part of that company, and others acting for it, to make under oath monthly returns of the amounts and kinds of timber cut, with a description of the particular tract or tracts from which it was cut, how much was disposed of, and to whom, and that a failure to do so was a failure in a fiduciary capacity on the part of the defendant company, and therefore there is jurisdiction in equity. The Government contends that by reason of the duty of the Bitter Root

Development Company to keep true and accurate accounts and to monthly submit statements to the officers of the Government, and by reason of its failure so to do, the proceeds of the lumber retained by it became in its hands a trust fund belonging to the complainant; that there was a breach of this trust; its extent is in the defendants' knowledge; and in such cases choice of remedy is with the party aggrieved, and he may proceed in equity for an accounting and pursue the fund. It is doubtful, to say the least, whether an obligation to report as to timber cut on the permitted lands constitutes any fiduciary relationship between the licensees and the Government, with regard to an alleged wrongful cutting of timber on other and separate lands. It is not, in truth, alleged that the returns called for by the permit were not made. (*Safford* v. *Ensign Manufacturing Co.*, 120 Fed. Rep. 480, Circuit Court of Appeals.) However that may be, there is no such obligation (to render monthly accounts) set forth in the bill as being part of the permit or license referred to therein. The bill simply avers that Daly did, at certain times, during the several years of said depredations, apply to and obtain from the lawful agents of the Government licenses to cut upon certain small portions of the tracts above described, and under cover of such permits the conspirators not only cut, carried away and manufactured timber growing on the said lands included in such licenses, but, well knowing that such permits gave them no right or authority to enter upon other lands, they willfully and fraudulently entered upon large tracts of land adjacent thereto and cut the timber therefrom. There is no mention of an obligation to render monthly accounts. The fact that the defendants had permission to cut timber on certain tracts of land described did not make their cutting of timber on other tracts the act of trustees *ex maleficio*. When they went outside of the tracts for which license was given, they committed a trespass for which they were liable at law. And, again, as the contents of the permits are not set forth, we cannot take judicial notice of such contents in any particular case. Different conditions may be contained in different permits, and they are the subject of the discretion of the department giving the permits.

It is also argued that a court of equity has jurisdiction in such a case as this on the ground of an accounting. We do not think that this is any such case as gives a court of equity jurisdiction because of an accounting being necessary. There are no accounts between the parties. The cause of action is one arising in tort and cannot be converted into one for an account. The case made is a plain trespass, for which the defendants are liable in damages. Or it might be termed an action in trover, as stated. Whatever books, if any, defendants may have kept, showing the amount and location of the timber cut and its value, can be perfectly well obtained by an inspection of these books in an action at law. No discovery is alleged to be necessary in aid of any action at law, although the bill shows that

several such actions have in fact been commenced. The facts averred do not show jurisdiction for the general purpose of discovery.

Nor do we see that there is any jurisdiction on the ground of prevention of a multiplicity of suits. Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other. It is not a case where a few defendants may be made parties as representatives of a class holding under or claiming the same title or right, and so that a judgment against the representative defendants may bind all others of the class. There is no class and there can be no representatives.

We fail to see any fact alleged in this bill which constitutes a proper foundation for the jurisdiction of a court of equity. The Government counsel, however, assert that since the filing of this bill new and material facts have been discovered by the Government, which in the judgment of counsel would furnish foundation for a bill in equity, even though this bill is defective. In order to permit of the filing of such a bill, if counsel should be so advised, and so as not to run against a plea of *res adjudicata*, the judgment of dismissal is

Affirmed, without prejudice, etc.

Mr. Justice WHITE and Mr. Justice MCKENNA took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.